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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-331

The North Carolina Utilities Commission, Southeastern Association of Regulatory Utility Commissioners, et al.,

Petitioners,

v.

The Federal Communications Commission and the United States of America, et al.,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, The North Carolina Utilities Commission ("NCUC") and the Southeastern Association of Regulatory Utility Commissioners ("SEARUC"), request this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit in this case.

Opinions Below

The decision of the Court of Appeals is reported at ——F. 2d——, and appears at Appendix A of the companion volume of appendices.[1] The decision of the

1. Citations herein to the appendices are to pages of Petitioners' Appendix — "Pet. App."

Federal Communications Commission ("FCC") is reported at 45 F.C.C. 2d 204, and appears at Appendix B.

Jurisdiction

The judgment of the Court of Appeals, which appears at Appendix C, was entered on April 14, 1976. Timely petitions for rehearing and rehearing *en banc* were denied on June 8, 1976 (Appendix D). This Court has jurisdiction under 28 U.S.C. §1254(1).

Question Presented

The question presented is whether the FCC exceeded its authority under Sections 2(b) and 221(b) of the Communications Act of 1934 when it preempted the jurisdiction of the state regulatory commissions over terminal equipment which is an integral part of the local telephone network and used predominantly in local and intrastate communications service.

Statutes Involved

Sections 2(b)(1) and 221(b) of the Communications Act provide as follows:

Section 2, 47 U.S.C. § 152, provides:

* * * *

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, ...

Section 221, 47 U.S.C. § 221, provides in part:

* * * *

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local government authority.

Other pertinent provisions of that Act and representative provisions of that Act and representative provisions of state regulatory statutes are set forth in Appendix E.

Statement of the Case

NCUC is the commission created by North Carolina and charged by North Carolina law with the responsibility, *inter alia*, for assuring the establishment and maintenance of telephone communications service within the state and assuring that such service is provided at just and reasonable rates. (N.C. Gen. Stats., Ch. 62, §§3(23)(a) (6), 30, 32 (1965). SEARUC is an organization consisting of the regulatory commissioners of the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. These commissions are charged by the laws of their respective states with responsibilities similar to those of NCUC.

This case presents the most fundamental and important question with respect to the proper spheres of jurisdiction of the FCC and the state commissions that has been presented to this Court since the FCC was created by the Communications Act of 1934.

This case involves the validity of an Order of the FCC, dated February 5, 1974, in its Docket No. 19808, in which the FCC declared that it had preempted state regulation of the connection of customer-provided terminal equipment to local telephone exchanges and intrastate switched telephone networks. (Order paras. 27, 38; Pet. App. [21b; 31b]) It thus presents the most fundamental important question with respect to the proper spheres of jurisdiction of the FCC and the state commissions that has been presented to this Court since the FCC was created by the Communications Act of 1934.

A. *Nature of the Telephone Services and Facilities Involved*

When a customer subscribes to telephone service, the local telephone company provides the subscriber with "station apparatus" or "terminal equipment" by means of which the subscriber makes and receives calls or otherwise obtains access to the telephone network. The terminal equipment is usually located on the subscriber's premises, and consists typically of the standard handset (i.e., the "telephone") that is used by virtually all residential telephone subscribers. The telephone company also connects the subscriber's terminal equipment to a pair of wires (a "subscriber loop") that lead to a central switching office — a local building that houses the telephone company's

switching apparatus. This arrangement gives a subscriber the capacity to make local exchange calls, intrastate long distance toll calls, and also, through ties to interstate lines or microwave transmission facilities, to make interstate long distance toll calls.

No matter what the ultimate destination of a subscriber's call, his message originates in the same terminal device and travels initially over the same wires to the same central switching office. If the message is intended for another telephone subscriber within the sender's local exchange area, it is switched directly onto circuits that lead from the central switching office to terminal equipment on the receiver's premises, or is directed to another nearby central switching office and from there routed to the receiver's premises. In either case, the sender has used "telephone exchange service," for which he pays the local telephone company a monthly exchange service charge regulated by a state regulatory commission.

If the telephone subscriber desires to send a message outside his exchange area but to a location within the state, the message originates with the same terminal equipment and travels over the same circuits into the same switching office. At this point, the message is routed to a toll switching center and from there transmitted to the exchange area of the intended receiver where the message is, in turn, switched to the receiver's premises. For this intrastate call between exchange areas, the subscriber must pay a separate long distance toll charge, regulated by a state regulatory commission.

Finally, a subscriber may wish to transmit a mes-

sage outside his telephone exchange area and into another state, for which he must also pay a separate toll charge. Again, the message will be sent initially over the same terminal equipment and circuits to the same switching office. The interstate call is routed to a toll switching center and then is transmitted by means of wires, cable or radio signals outside the sender's state to a toll switching center in the receiver's state. From there the message is routed to the receiver's exchange area and switched to the receiver's premises in the same manner as intrastate toll and local exchange calls.[2]

All calls over the switched telephone network make use of common terminal equipment, common lines to a central switching office, and common switching apparatus in that office. Of all calls transmitted over these common facilities, currently about 97% are local exchange or intrastate toll, and only 3% are interstate long-distance. (Order, par. 15; Pet. App. [14b])

Although the typical terminal equipment used by a subscriber is the standard telephone handset, other more sophisticated and specialized terminal equipment can sometimes be connected directly to the subscriber's "loop." This equipment includes, for example, private branch exchange switchboards (PBX's) for

2. A single telephone company does not necessarily have the physical facilities to provide all three types of switched telephone service. Hundreds of different telephone companies provide local exchange service, and since most of these companies do not own interstate facilities, their subscribers make long distance interstate calls through the physical connections of their local company with the long lines division of American Telephone and Telegraph Company (AT&T).

use in business communications systems, automatic answering and recording machines, and devices that provide for the transmission of computerized data through the telephone network. Telephone companies offer such equipment to their subscribers at additional charges. In addition, some unregulated manufacturers of terminal equipment offer to lease or sell their devices directly to subscribers for connection to the telephone company's network or attachment to the telephone company's terminal equipment where such connection or attachment has been permitted by tariffs filed with the state regulatory authorities.

B. *State Regulation of Local and Intrastate Charges, Classifications, Practices, Services and Facilities*

From virtually the beginning of the telecommunications industry in this country to the present, the North Carolina Utilities Commission and the other state commissions have regulated the charges, classifications, practices, services and facilities used in connection with local exchange and intrastate toll telephone service, including the terms and conditions on which a subscriber could replace the telephone Company's equipment with his own equipment or attach additional devices to the terminal equipment provided by the telephone company. This state commission regulation has been conducted pursuant to state regulatory enactments creating the commissions, granting them pervasive powers to regulate the carriers, and requiring the carriers to file tariffs describing the service and the rates therefor with the state commissions. The commissions have the power to review the tariffs to require modifications of rates, regulations or provisions governing facilities, and to compel adherence

to the tariffs as modified and approved.[3] For many years prior to 1934, as well as subsequent thereto, intrastate and local exchange tariffs filed by the local telephone companies with the state commissions have included provisions with regard to attachments and direct inter-connection of customer-provided terminal equipment to the telephone companies' networks.[4]

From its inception, state regulation of telephone service has been premised upon the decisions of state legislatures that the public interest is *not* served through unrestricted competition in the provision of telecommunications service. Prior to regulation (and after expiration of the initial telephone patents), anyone could set up a telephone exchange and offer telephone service. The result in many towns was two or three competing telephone exchange systems, requiring subscribers to install and pay for two or more telephones side-by-side in order to be able to reach every other subscriber. Such duplicative facilities required far more investment than was necessary to create an efficient telephone network.[5]

3. Representative state statutory provisions are set forth in Appendix E.

4. For example, the General Exchange Tariff for Southern Bell filed with the North Carolina Commission in 1920 and in effect in 1934 provided that "no instrument, appliance, or device of any kind, not furnished by the telephone company shall be attached to or in any way used in connection with such telephone equipment, apparatus and lines [furnished by the telephone Company]." Similar provisions appeared in the intrastate and exchange tariffs of Southern Bell and other telephone companies on file with the other state commissions in 1934. By contrast, AT&T's tariffs covering long-distance service do not offer telephones or other terminal equipment.

As unregulated entities, the early telephone companies were also free to serve whatever locations they chose, and thus they frequently elected to serve only the most profitable segments of the geographical markets in which their lines were located. Those segments consisted of areas whose residents were wealthy and could afford to pay high rates for telephone service, and areas that were the least costly to serve, such as densely populated central business districts. This pattern of unregulated competition placed outlying and rural areas, as well as poor urban residential areas, at a critical disadvantage in receiving telephone service.

The response of the state legislatures to these problems was to substitute regulation for competition as the means of promoting the public's interest in widely available telecommunications service at reason-

5. The Supreme Court of Pennsylvania accurately described the deleterious effects of this early structure of the telecommunications industry in *Perry County Tel. & Tel. Co. v. Public Service Commission*, 108 A. 659, 660-661 (1919):

> "[D]uplication of facilities merely results in the placing of an additional burden upon the public by forcing patrons to maintain two systems where one would serve the purpose as effectually and at less cost. . . . The duplication of telephone systems in a given locality without connection between their lines requires subscribers to install both systems and pay for double service to reach subscribers on but one of the two systems; or, as frequently happens, subscribers maintain both systems when they can reach other users with equal facility on either system."

able prices.[6] Typically, state regulation was and continues to be premised on the principle that a telephone company is a common carrier public utility, and as such it is required to serve all segments of the public and to do so on fair and non-discriminatory terms. The state regulatory agencies were given power fully to regulate the price of telephone service to different groups of subscribers and to require that such service be made available to all without regard to costs of such service for particular groups of subscribers. To be sure, the state regulatory agencies are obliged by constitutional and statutory standards to permit regulated telephone companies to earn revenues sufficient for a fair overall return. But so long as such a fair overall return can be earned, it is the responsibility of the regulatory agencies, not the telephone companies, to determine the amounts different classes of telephone users should contribute to meet the companies' overall revenue requirements.

As a corollary to regulation in the public interest, state regulatory agencies were also given the power to limit entry into the telecommunications industry. Since the public interest frequently required the maintenance of rates unrelated to costs, this control over entry was absolutely critical to the regulatory scheme. Otherwise, unregulated competitors could enter those portions of the market in which rates were relatively high in comparison with costs and "skim the cream" of the business — a practice that would be plainly

6. State regulation of telecommunications became widespread beginning in the late 1890's and by 1910 only a few states had not enacted regulatory statutes. Today every state has an agency charged with the responsibility of regulating telecommunications within its borders.

detrimental not only to the regulated telephone company, but also ultimately to the ordinary residential user for whose benefit these relatively higher rates were prescribed in order to make possible the availability of basic telephone service at reasonable rates within his reach.

Effective state regulation of rates and rate structures is dependent upon the power of state regulatory agencies to regulate entry into the market for telephone facilities and interconnection devices. This dependence was explained in testimony before a Senate Committee investigating broad aspects of the telecommunications industry by Professor Cyrus J. Colter, for more than 23 years a member of the Illinois Commerce Commission (*Hearings on S. 1167 Before the Subcom. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 5, at 3812-3913 (1974)):

> "At present, the state regulator is able to design rates in a way that the charge for the basic services — i.e., for the use of his telephone by the average householder — is held low, while other charges, such as for terminal facilities, extensions, PBX's, etc., are kept higher. Also, residential rates are invariably kept lower than business rates. These rate policies are not new, but historical, and have served the nation well.
>
> "But now these new — and I can only call them selfish — interests have appeared with the clear intention of under-pricing in those special areas in which regulators have heretofore kept the prices higher; kept them higher in order to provide lower, though reasonable, charges for the great body of

household telephone users across the country. Such competition may be good for these special interest entities which are not at all averse to competing with a regulated system. But it is not good, in my opinion, for the American public, especially the part of it which is economically disadvantaged — the unfortunate. It ties the regulator's hands as he attempts to set rates which will meet overall public interest standards — and especially the needs of the poor, the elderly, and the ill.

"To allow selective entry into this market by, for example, the specialized common carrier can only result in a further dislocation of present tenuous regulatory rate options. Regulators would then have no choice but to give greater weight than formerly to the cost of serving each class of customer with the result that a steeper rate of increase to the lower-income telephone user would be inescapable. Some may ask, 'What's wrong with that? This customer is only being asked to pay his fair share — what it costs to serve him.' What, in my opinion, is wrong with it is that it lacks the input of responsible government with a social conscience — without which a government will not long be governing."

The powers to regulate rates and entry thus conferred upon state regulatory agencies became a powerful tool for the development and implementation of public policy. Most regulatory agencies early recognized that business subscribers receive greater value than residential subscribers from telephone service. On the basis of the value of service principle, business subscribers have generally been required to pay higher

rates than residential customers, thus permitting the regulatory agencies to keep residential rates relatively lower and thereby to promote the general availability of service. See, *e.g.*, *Pacific Telephone & Telegraph Co.*, P.U.R. 1919D 345, 370-371 (Ore. P.S.C. 1919). A similar policy objective has been pursued by virtually all of the states insofar as rural subscribers were concerned. Although it has been recognized that rural and lightly populated areas are much more costly to serve, regulatory agencies have required statewide uniformity of rates for important aspects of telephone service, thus causing many urban subscribers to pay rates in excess of the costs of their service in order that rural subscribers can obtain service at rates they can afford. See, *e.g.*, *Pacific Telephone & Telegraph Co.*, P.U.R. 1922C 248, 272 (Ore. P.S.C. 1922); *Mountain States Telephone & Telegraph Co.*, P.U.R. 1918F 415, 664 (Colo. P.S.C. 1918). Yet another frequently used ratemaking practice has been that of requiring relatively high charges for certain terminal equipment in order to hold down other rates and charges. Thus, extension telephones have generally been priced at levels well above their costs on the theory that those using such telephones (presumably wealthier subscribers) should make a relatively larger contribution than subscribers using only main station service. See, *e.g.*, *Morris v. New Jersey Bell Telephone Co.*, 6 P.U.R. (n. s.) 258, 260-261 (N.J.B. P.U.C. (1934)). The same principle has often been applied to so-called decorator phones — that is, telephones designed to complement the decor of the rooms in which they are placed. See, *e.g.*, *General Telephone Co. of Cal.*, 80 P.U.R. 3d 2, 74-76 (Cal. P.U.C. 1969); *Chesapeake & Potomac Telephone Co. of Maryland*, 56 P.U.R. 3d 91, 115 (Md. P.S.C. 1964). And many states have recognized the

greater value of service to business of sophisticated terminal equipment such as private branch exchanges (PBX's) and key telephone systems by establishing rates for such equipment substantially in excess of costs, thereby again lessening the burden upon basic residential subscribers. See, *e.g.*, *General Services Administration v. New York Telephone Co.*, 63 P.U.R. 3d 451, 462-63 (N.Y. P.S.C. 1965); *Public Service Commission v. Mountain States Telephone & Telegraph Co.*, P.U.R. 1927B 193 (Mont. P.S.C. 1926).

The overriding principle that explains all these ratemaking practices is the promotion of universal telephone service. Having struggled through a period of competition in the telecommunications industry that sharply restricted both the availability and the usefulness of telecommunications services, the states developed ratemaking policies designed to cure the basic defects that plagued the early days of the industry. This principle has been articulated by numerous regulatory agencies. In *Pacific Telephone & Telegraph Co.*, P.U.R. 1919D 345 (Ore. P.S.C. 1919), for example, the Oregon Public Service Commission held (*id.* at 370-371):

> "Residence service costs more for investment and but little less for operation than business, yet the rates must be much lower or service will not be taken. It is the extensive use of telephones in residence service that makes their use valuable to business. . . . [R]esidence service is commonly conducted at a loss made up in the charges for business use. . . . . Any attempt to make rates proportionate to cost would result in residence charges so high that few householders would use the telephone at all. . . ."

See also *Southern Bell Telephone & Telegraph Co.*, P.U.R. 1929E 392, 396-397 (La. P.S.C. 1929); *Board of Trade v. Mountain State Telephone Co.*, P.U.R. 1916C 688, 700-701 (N.Y. P.S.C. 1916); *Empire Telephone Co.*, P.U.R. 1915B 561, 565 (Ill. P.U.C. 1915).

This is not to say, of course, that all states have followed identical policies in structuring rate schedules; complete uniformity in regulation among the states does not now exist, nor has it ever existed.[7] Quite obviously, the need for a relatively greater contribution from business, urban and special equipment users to support reasonable residential rates for basic service will vary from state to state, depending upon the level and distribution of personal income throughout the state, the nature and extent of business activity, the pattern of population dispersion and numerous other factors. However, it remains true that in most if not all of the states, reliance upon ratemaking powers is necessary to promote the broad availability of telecommunications services to the widest possible range of users so as to override particular cost considerations that exist in various areas of the state and among various classes of users. Hence, most states, including

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7. At least one state regulatory agency has determined, for example, that the public interest within its state is best served by a limited amount of competition in the provision of telephone terminal equipment and has liberalized somewhat the conditions upon which certain customer-provided terminal equipment can be connected directly to the network. See, *Investigation . . . into the Promulgation of a General Order Providing for . . . the Interconnection of a Customer-Opinion and Order*, Case No. 9625 Cal. P.U.C. (April 22, 1975). California's policy was necessarily based upon the state regulatory agency's assessment of the particular conditions existing in that state.

the states represented here, still require the maintenance of non-cost related rate structures in order to hold down the price of basic residential service and thereby to bring such service within the economic reach of a maximum number of households. See, *e.g.*, *Southwestern Bell Telephone Co.*, 95 P.U.R. (n.s.) 1, 9 (Ark. P.S.C. 1952); *Mutual Telephone Co.*, 76 P.U.R. (n.s.) 389, 402-03 (Hawaii P.U.C. 1948); *Southern Bell Telephone & Telegraph Co.*, 18 P.UR. 3d 113, 124 (Ky. P.S.C. 1957).

Prior to the instant Order, the FCC had never sought to deprive the states of their traditional jurisdiction over terminal equipment or rates and rate structures applicable to various forms of local exchange service, or entry into any facet of the market for local service. In the few instances where the FCC had asserted exclusive jurisdiction over terminal equipment used in common for both intrastate and interstate communications, the equipment was not used in connection with switched telephone exchange service within the meaning of the Communications Act.[8] The then Chairman of the FCC recently reaffirmed this position in a letter, dated July 9, 1973, to Senator Jennings

8. See, *American Telephone & Telegraph Co.-TWX*, 38 F.C.C. 1127 (1965); *Department of Defense (DOD) v. General Telephone Co.*, 38 F.C.C. 2d 803 (Review Board 1972), *aff'd* 41 F.C.C. 2d 1047 (1973), *aff'd per curiam St. Joseph Telephone & Telegraph Co. v. F.C.C.*, 505 F.2d 476 (D.C. Cir 1974); *General Telephone Co.*, 13 F.C.C. 2d 448 (1968), *pet'n for reconsideration denied*, 14 F.C.C. 2d 695 (1968). In the *General Telephone Co.* case, for example, the Commission stressed that its assertion of jurisdiction over cable TV facilities did not threaten states' jurisdiction over terminal facilities used for intrastate and local exchange telephone service (14 F.C.C. 2d, at 696).

Randolph, Chairman of the Senate Subcommittee on the Handicapped, who had inquired whether the FCC required the hearing aid industry to provide equipment for the coupling of hearing aids to telephone instruments. Chairman Burch replied that the FCC lacked jurisdiction over facilities used in local exchange service:

> "We . . . lack primary jurisdiction over telephone sets which are a primary part of the facilities used in providing exchange telephone service. As you know, the Communications Act specifically excludes the Federal Communications Commission from any authority with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate and exchange telephone services of any telephone company; such local service matters are subject to the regulatory authority of State commissions in the various States."
>
> 119 Cong. Rec. S17297 (daily ed., Sept. 22, 1973).

Where the FCC has in the past exercised its jurisdiction over interstate aspects of the switched telephone network, it has been careful not to infringe upon state regulation of intrastate and exchange tariff provisions. In each case in which the FCC considered the lawfulness of tariff provisions governing interconnection, the Commission ruled only on the legality of interconnect conditions that were part of the *interstate* tariffs of telephone companies. See, *Use of Recording Devices*, 11 F.C.C. 1033 (1947); *Jordaphone Corp. v. American Telephone & Telegraph Co.*, 18 F.C.C. 644, 671 (1954); *Hush-A-Phone Corp. v. American Telephone & Telegraph Co.*, 22 F.C.C. 112, 114 (1957); *Carterfone*, 13 F.C.C. 2d 420, 426-27 (1968).

In *Jordaphone*, for example, the Commission respected the states' jurisdiction when it invalidated a provision in carriers' interstate tariffs that prevented the use of automatic answering and recording devices in connection with interstate communications. The Commission noted that "[t]he device, primarily used in connection with intrastate and local telephone service, would only *incidentally* be used to answer interstate and foreign calls" (18 F.C.C. 644, 670). The Commission then concluded (*id.* at 671):

> ". . . the foreign attachment provisions in the present interstate and foreign toll telephone message tariffs of the defendant telephone companies are unjust, unreasonable, and therefore, unlawful *to the extent that* they may be interpreted to prohibit the installation and use by the subscriber, of a telephone answering device not furnished by the telephone company *in any community or state in which the use of such answering device with respect to intrastate or exchange telephone service is authorized by appropriate local or state regulatory agencies or commissions.*" (Emphasis supplied)

The effect of this holding was to make the lawfulness of interconnection provisions in interstate tariffs depend upon whether the states allowed attachment of the recording devices to their telephone systems. Where states allowed such interconnection, prohibitions in the interstate tariffs were invalid; where states prohibited interconnection, like prohibitions in interstate tariffs remained valid.

In *Hush-A-Phone, supra*, and *Carterfone, supra*, the FCC similarly acted with respect to the interstate

tariffs of telephone companies. No question of allowing customers to substitute their own equipment for company-provided equipment was involved in either of those cases. In both cases the Commission held unlawful provisions in interstate tariffs that prohibited the connection of the foreign attachments in question to the telephone network. *Hush-A-Phone*, 22 F.C.C. at 114; *Carterfone*, 13 F.C.C. 2d at 426-27. The Commission ruled in each case that a subscriber's attachment of the additional devices to his telephone set did not cause harm to the telephone companies' facilities and employees and did not interfere with the public's use of the telephone system. The Commission therefore ordered in *Hush-A-Phone* that the telephone companies file revised interstate tariff schedules rescinding and cancelling any tariff regulations that prohibited the use of the *Hush-A-Phone* "in connection with interstate or foreign telephone service," 22 F.C.C. at 114; and ordered in *Carterfone* that the prohibitions on interconnection in the interstate tariffs then on file with the FCC be stricken as unlawful. 13 F.C.C. 2d at 426-27. In neither case, however, did the FCC purport to rule on the legality of provisions in any *intrastate* tariff that might prohibit the connection of such devices to the telephone network.

C. *Proceeding in North Carolina Leading to the FCC's Preemption Order*

Following the FCC's decision in *Carterfone*, the telephone companies in interstate communications filed with the FCC amended tariffs that changed previous restrictions on the connection of customer-provided terminal equipment to provide that interconnection would henceforth be permitted, subject generally

to two requirements designed to safeguard the telephone network: (1) that any network control signaling unit must be furnished, installed and maintained by the telephone company; and (2) that no subscriber could connect terminal equipment directly to the telephone network without the use of a protective interface device supplied by the telephone company. In addition to filing these revised interstate tariffs with the FCC, the telephone companies filed similar revised tariffs with the regulatory commissions of the states in which the companies provided intrastate and local exchange service, including North Carolina and other states.

The North Carolina Utilities Commission thereafter instituted an investigation into the effects of interconnection on several broad areas of public interest, including the quality, pricing, and availability of telephone service in North Carolina.[9] By Order of Investigation dated February 2, 1973, the North Carolina Commission announced that the purpose of the investigation was "to determine if as a general policy the public interest will be served by permitting the substitution of subscriber-provided equipment for that traditionally provided by the telephone companies." (North Carolina Order, February 2, 1973, p. 12.) The North Carolina Commission noted an increasing use of customer-provided terminal equipment following the FCC's *Carterfone* decision and the telephone companies' subsequent tariff revisions (*id.* at 4), and stated that

9. *In Re Investigation of Interconnection of Subscriber-Provided Equipment with the Telephone Network of Telephone Companies Under the Jurisdiction of the North Carolina Utilities Commission*, Docket No. P-100, Sub. 31.

its investigation would be "structured to investigate the economic and service impact that interconnection is or will have in North Carolina and what change, if any, should be made in the method of providing telephone service and establishing telephone rates." (*Id.* at 12.)

The North Carolina Commission noted that the National Academy of Sciences (NAS) had studied the feasibility of maintaining service quality while allowing interconnection of customer-provided equipment,[10] and that the Academy's report included a finding that uncontrolled interconnection to the common carrier network as it now exists would be harmful. (*Id.* at 2-3)[11] The North Carolina Commission also expressed concern that the proliferation of terminal equipment supplied by unregulated manufacturers would have a major

10. "Report of a Technical Analysis of Common Carrier/User Interconnections" by the Special Panel on Common Carrier Interconnection of the National Academy of Sciences' Computer Science and Engineering Board. The study was undertaken pursuant to a contract with the FCC and was released by the FCC in connection with Public Notice 51094, July 1, 1970. See 35 F.C.C. 2d 539, 540 (1972).

11. The NAS report had advised, in particular, that the telephone network must be protected from harm to service and equipment in four broad areas: hazardous voltages and currents, excessive signal power, improper network control signaling, and improperly balanced terminal equipment. These malfunctions can cause physical harm to telephone company personnel; damage to sensitive equipment throughout the system; noise and interference in other subscribers' communications (including "cross-talk," where one subscriber's message is overheard on the line of another); wrong numbers; dial tone delays; interrupted connections; incorrect billings; and over-use of telephone company operators, repairmen, and other personnel to remedy these problems.

impact upon the rate structures for local residential service. (North Carolina Order, February 2, 1973, p.p. 10-11.) The largest market for such terminal equipment is in sales of sophisticated and expensive terminal equipment used predominantly by business subscribers. If unregulated manufacturers were permitted to "cream skim" in this segment of the market the telephone companies would be obliged to lower their prices on comparable equipment or lose the business to the manufacturers' lower priced direct sales. Whether the business user buys terminal equipment from an unregulated supplier or from the telephone company at reduced rates, the telephone companies would lose revenues which would have to be recovered elsewhere in the rate structure, most notably in the charges for basic telephone service.[12] The North Carolina Commission thus concluded that "the advantages of interconnection rest with the business subscriber, not with the residential subscriber." (*Id.* at 4.)

Following the submission of studies and data relating to the issues by most of the telephone companies in North Carolina, the North Carolina Commission issued a further Order on June 29, 1973, giving notice of proposed rulemaking, and stating (pp. 2-3):

> ". . . [T]he Commission is of the opinion that the interconnection of subscriber-provided equipment

12. A recent study conducted by the National Association of Regulatory Utility Commissioners concluded that widespread connection of customer-provided terminal equipment could result in increased telephone rates for local residential and other users approximately $360-740 million annually by 1980, and approximately $1 billion annually by 1984. *NARUC Report after Investigation*, May, 1974.

> affects the public interest, and that a public hearing should be held in connection with the investigation herein to determine reasonable rules for the protection of the public interest in economical and reliable telephone service as it might be affected by the interconnection of subscriber-provided equipment . . . and to determine what rules are required to guarantee to the general body of subscribers that the quality of service and economy of service of the basic telephone network is not adversely affected by further and continued use of customer-provided equipment."

The North Carolina Commission set forth in its Order a proposed Rule R9-5 which gave notice of the maximum scope of the investigation, and under which no telephone company doing business in North Carolina would be permitted to provide service over its communications system "except through station apparatus and equipment installed, owned and serviced by the telephone company and for which the telephone company takes complete responsibility to its customer" [Rule R9-5(a)]. The Rule would further provide that the telephone company "shall own, service and be fully responsible for and accountable to the Utilities Commission and to its customer for adequate service and maintenance of all equipment used in telephone service in North Carolina." (*Id.*)[13]

13. Other states similarly indicated an intention to enforce regulations or limits on interconnection of customer-provided termial equipment. The Attorney General of Nebraska ruled that a hotel which used its own telephone equipment was itself required to obtain a state certificate of public convenience and necessity. (Pet. App. [2b; 37-38b] And the Oklahoma commission affirmed its requirement that in cer-

On August 8, 1973, following the announcement by the North Carolina Commission of its proposed Rule R9-5, Telerent Leasing Corp., a North Carolina supplier of equipment for interconnection, the North American Telephone Association (NATA), and other equipment suppliers in North Carolina and Nebraska, filed with the FCC a Petition for Order and Declaratory Ruling, requesting the Commission to rule that its regulation of interstate interconnection had preempted state regulation of interconnection with local exchange and intrastate telephone systems. NATA is a national trade organization of unregulated companies engaged in the manufacture, distribution, installation and maintenance of interconnecting terminal equipment of the type that is the subject of the proposed North Carolina Rule. NATA contended in the Petition that the action of the North Carolina Utilities Commission had caused a decline in the markets for the terminal equipment sold by its member firms with resulting lost profits to NATA members. (NATA Petition, pp. 30, 33; Order, par. 10).

Responding to the NATA Petition, the FCC stated (43 F.C.C. 2d 487):

> "The primary question raised by the petition is whether and, if so, to what extent the actions which we have taken on interconnection of customer-provided communications equipment to the nationwide switched public telephone network have preempted state action in this area."

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tain circumstances interconnection of customer-provided equipment would require a certificate of public convenience and necessity. (Pet. App. [39b])

Oral argument before the Commission *en banc* was held on October 30, 1973, and the Commission adopted its Memorandum Opinion and Order on January 31, 1974 (released February 5, 1974), granting the declaratory relief sought (45 F.C.C. 2d 204; Pet. App. [40b]).

> "57. In the light of all of the foregoing, IT IS HEREBY ORDERED that the petition for a declaratory ruling IS GRANTED to the extent reflected and IS OTHERWISE DENIED."

In its Order, the Commission declared that its regulation of the technical standards for interconnecting terminal equipment used for interstate communications had preempted the states' authority to control the interconnection of customer-provided terminal equipment in intrastate and local exchange telephone systems. The Commission ruled that it had "primacy in authority over the terms and conditions governing the interconnection of customer-provided equipment to the nationwide telephone network," (Pet. App. [31b]), notwithstanding the fact that 97% of the messages transmitted over the average subscriber's terminal equipment are entirely intrastate or local exchange communications. The Commission thus decreed, over the strenuous objections of many state commissions, that "where the rendition of interstate and foreign service is dependent upon plant facilities which are also used for exchange or other interstate services, the Federal role must be controlling." (Pet. App. [21b]). The Commission accordingly declared that the proposed Rule of the North Carolina Utilities Commission was in direct conflict with the interconnect policy of the FCC, and if

adopted and enforced, would be invalid as contrary to preemptive and superseding federal regulation. (Pet. App. [20b].[14]

Following its preemption order involved in this case, the FCC in its separate Docket No. 19528 exercised its newly-claimed jurisdiction by promulgating a series of orders establishing a massive new federal regulatory program permitting direct interconnection of customer-provided terminal equipment to the local telephone company exchange facilities. Such interconnection was permitted upon registration of the equipment with the FCC. The states and the telephone companies were prohibited from requiring use of protective interface devices to safeguard the telephone network. The FCC's orders in that proceeding are presently on appeal to the United States Court of Appeals for the Fourth Circuit (Nos. 76-1002, 76-1152, 76-1292, 76-1415, 76-1416, 76-1443, 76-1467 and 76-1502). That case has been briefed, and argument is scheduled for September 21, 1976.

D. *The Decision of the Court of Appeals for the Fourth Circuit*

The Court of Appeals for the Fourth Circuit affirmed the FCC's preemption order by a 2-to-1 vote. The majority opinion adopted a construction of Section 2(b) of the Communications Act which would fragment

14. The Commission also declared that certain regulation by the authorities in Nebraska and Oklahoma of interconnection to intrastate and local exchange networks (see *supra*, p. 23, fn) would be invalid as contrary to the FCC's preemptive jurisdiction over interconnection. (Order, paras. 52, 55-56; Pet. App. [37-38b; 39-40b]).

jurisdiction over "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communications service." The court construed Section 2(b) as authorizing the FCC to regulate "facilities" used in local and intrastate service, but not the "charges" applicable to such service. The majority held that the FCC had jurisdiction over interstate facilities — including the power "to determine what terminal equipment can safely and advantageously be interconnected with the interstate communications network and how this shall be done" (Pet. App. [12-13a]). Since the same facilities were used for both interstate and intrastate calls (though only approximately 3% for interstate calls), the federal and state regulatory rules for these same facilities might conflict. The court ruled that under Section 2(b) the federal rule — that of the FCC — preempted the rule of the states.

However, the court ruled that under Section 2(b), the states could continue to regulate local and intrastate telephone rates. (Pet. App. [13a, n.6]) The court did not attempt to reconcile its fragmented view of Section 2(b) with the fact that by its express terms Section 2(b) protected the jurisdiction of the state commissions over intrastate "facilities" in the very same phrase where it protected their jurisdiction over intrastate "charges". Instead, the court based its analysis upon the legislative history of Section 2(b), which showed that the states' concern about the possible expansion of power on the part of the new FCC "Focuse[d] upon the desire of state authorities to regulate local telephone rates and charges." (Pet. App. [13a, n. 6]) The majority reasoned that paramount federal jurisdiction over facilities would not interfere with

state jurisdiction over rates since "rate making typifies those activities of the telephone industry which lend themselves to practical separation of the local from the interstate. . . ." (*Id.*) Accordingly, the majority held that extending FCC jurisdiction to local facilities would not result in encroachment upon state ratemaking powers. On this basis, it held that its decision was consistent with the legislative history of the Communications Act, which, as even the FCC had conceded,[15] showed plainly that the states were intended to have exclusive jurisdiction over the "local telephone rates and charges," including the rates and charges for terminal equipment. (*id.*)

Petitions for rehearing were denied by a 1-to-1 vote.[16] (Pet. App. [1d]). Rehearing *en banc* was also

15. The FCC expressly recognized throughout its proceedings herein that the Communications Act preserved the exclusive jurisdiction of the states over local telephone exchange rates and charges. Thus, in its opinion and order the Commission conceded that only the states could regulate intrastate rates (45 F.C.C. 2d at 219):

> "[T]he legislative history of the Communications Act clearly shows that in enacting Sections 2(b) and 221(b), the Congress was primarily concerned with the preservation of traditional State jurisdiction of intrastate rates and services. . . ."

In its brief on appeal to the court below, the FCC again recognized that both the language of the Communications Act and its legislative history plainly shows a purpose "to avoid federal intrusion into purely intrastate matters — rates, in particular" (Brief for FCC at 31).

16. The panel consisted of Judge Widener, from the Fourth Circuit, and Judges Hastie and Tuttle, from the Third and Fifth Circuits. Judge Hastie died shortly after the opinion was filed.

denied because all other active judges in the Fourth Circuit were disqualified from sitting in the case. (Pet. App. [1d]).

Reasons for Granting the Writ of Certiorari

I.

The Court Below Erred in Holding That Section 2(b) of the 1934 Act Does Not Protect the Jurisdiction of the State Commissions Over Facilities Used For Local and Intrastate Communications Service.

In Section 2(a) of the Communications Act of 1934, Congress authorized the FCC to regulate "interstate and foreign communication." (47 U.S.C. §152(a)) This grant of jurisdiction was qualified, however, by Section 2(b) of the Act, which provided that the FCC may not use its jurisdiction over interstate communications to intrude upon the states' jurisdiction over intrastate communications, charges, services or facilities (47 U.S.C. §152(b)):

> "Subject to the provisions of section 301 of this title [dealing with radio frequencies], *nothing* in this chapter *shall be construed to apply or to give the Commission jurisdiction with respect to* (1) charges, classifications, practices, services, *facilities*, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, ..." (Emphasis supplied.)

In Section 221(b) of the Act Congress also expressly reserved to the states the right to regulate "telephone exchange service," even though communication within

the telephone exchange area may be across state lines (47 U.S.C. §221(b)):

> "Subject to the provisions of section 301 of this title, *nothing* in this chapter *shall be construed to apply, or to give the Commission jurisdiction, with respect to* charges, classifications, practices, services, *facilities*, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State Commission or by local governmental authority." (Emphasis supplied.)

The jurisdictional dispute between the FCC and the state commissions presented in this case arises out of the fact that the same local telephone facilities — including the basic telephone handset — that are used for both local and intrastate service are also connected by interstate trunk lines to provide interstate service.

There is nothing new about this question of who should be authorized to regulate the telephone handset and other terminal equipment. In 1934, just as today, the same local telephone exchanges and switching facilities, the same telephone handsets, and the same local loops connecting the telephone to the central exchanges, were all (or virtually all) used both for local or intrastate calls and for interstate calls. The question thus arose: which level of government, the federal government or the states, should provide the regulatory rule which would govern these instruments of both local and interstate communications service. Congress knew that at that time approximately 98% of all calls were local

or intrastate calls, and only approximately 2% were interstate. (78 Cong. Rec. 10316 (1934)) Thus, it decided that "the tail should not wag the dog," and that the state commissions should continue to regulate local facilities, services, and rates. To accomplish this purpose it provided in Section 2(b) that "*nothing* in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, *facilities*, or regulation for or in connection with intrastate communication service by wire or radio of any carrier, ..." (Emphasis supplied.)[17]

In this respect, nothing has changed since 1934. Local exchanges and intrastate telephone messages still amount to approximately 97% of total messages. And

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17. Section 221(b) deals with the situation where a local telephone exchange overlaps state boundary lines and includes two or more states, and provides that even in this situation— where what is essentially a local call happens also to be an interstate call — "nothing in this chapter shall be construed . . . to give the Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations . . . *in any case where such matters are subject to regulation by a State Commission or by local governmental authority.*" (Emphasis supplied.) This latter italicized language does not appear in Section 2(b), making it clear that in the case of ordinary local exchanges (which do not overlap state boundaries) the absence of FCC jurisdiction does not depend upon the existence of regulation by a state commission or local governmental authority. Thus, under Section 221(b) state regulation takes precedence over FCC regulation where a local exchange overlaps state boundaries; and nothing could make it plainer that the FCC has no jurisdiction at all over local exchanges or facilities where there is no such overlap or interstate communication.

Congress has not repealed Section 2(b) or amended Section 2(b) by omitting the word "facilities."

The court below erred in treating this case as a typical preemption case, involving conflicting federal and state enactments or regulations where under the "supremacy clause" the federal rule must take precedence over the state rule. Such analysis has no applicability in construing the pertinent sections of the Communications Act to determine whether Congress intended the FCC or the states to regulate the facilities used predominantly for local and intrastate service.

The court below reasoned that since the FCC had jurisdiction over interstate communications, and since local facilities are used (approximately 3% of the time) in making interstate communications, therefore the FCC's jurisdiction must override or preempt the jurisdiction of the state commissions insofar as those local facilities are concerned. This would, in the court's view, leave the state commissions with "regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications." (Pet. App. [13a]). However, such a contruction of Section 2(b) ignores the fact — which was true in 1934 and is true today — that such "separable" facilities do not exist, and that virtually every local telephone in this country, and every local exchange, can be used to make an interstate call. Thus, the court below construed the prohibitory language of Section 2(b) so as to be totally without practical effect so far as the use of the word "facilities" is concerned. Such a construction is not only contrary to the plain language and obvious purpose of the Act, but it is

also contrary to the decisions of other courts construing the Act,[18] and is unsupported by any decision of this Court or any other court.

Indeed, such a construction is directly contrary to the FCC's own understanding of the statute, expressed in 1968 in *General Telephone Co.*, 14 F.C.C. 2d 695 (1968). There the FCC expressly acknowledged that Congress had been aware since 1934 that "every telephone can be connected with a trunk line for interstate calls." However, this "circumstance" of common instrumentalities used in both intrastate and interstate service has not led Congress to empower the FCC to regulate the common instrument. In fact, just the opposite was true. Congress had decided that since interstate use was "merely incidental," that common instruments should "remain under state regulations," and that "the tail should not wag the dog" (14 F.C.C. 2d 696):

> "When the Communications Act was enacted in 1934, Congress was concerned that the telephone might be considered an instrumentality of interstate communication merely because of the circumstance that every telephone can be connected with a

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18. In *Kitchen v. FCC*, 464 F. 2d 801 (D.C. Cir. 1972), the court held that a telephone building which was to house both local exchange and toll switching equipment was subject to state jurisdiction and *not* FCC jurisdiction even though the facility would be used in part for interstate communications. In *Southwestern Bell Telephone Co.* v. *United States*, 45 F. Supp. 403, 406-407 (W.D. Mo. 1942), the court held that the FCC had no jurisdiction over communications between the states of Kansas and Missouri within an area defined as a single local telephone exchange area. See also *General Telephone Co. of the Southwest* v. *Robinson*, 132 F. Supp. 39, 43 (E.D. Ark. 1955).

toll line for interstate calls. Since the interstate calls of the independent telephone companies were such a small part of their business as to be merely incidental, Congress agreed with the USITA position that *'the tail should not wag the dog'; that their telephone facilities should remain under State regulation, primarily because they were essentially local but also to avoid an unnecessary burden to the Commission and the small independent companies. . .*" (Emphasis supplied)

It is important that this basic jurisdictional issue be conclusively resolved by this Court. In the absence of such resolution, FCC efforts to preempt the state commissions over essentially local facilities and services will continue, leading to further controversy as to the limits of FCC jurisdiction and to further litigation.[19] As already pointed out (*supra*, p. 26), the FCC has promulgated a sweeping new program for "registration" with the FCC, of all terminal equipment connected to the local exchange networks, and the FCC's orders establishing this program are presently on appeal. Also, the FCC has relied on its *Telerent* decision in ruling that the states of California and Oklahoma

19. An example of the controversy raging in the wake of the FCC's preemption efforts is found in a statement of policy issued by the Iowa State Commerce Commission regarding the FCC Docket No. 19528 (the "registration" case). The Iowa Commission stated that, in its view, the Communications Act of 1934 protected the authority of the states over intrastate telephone service, including connection of terminal equipment. The Iowa Commission further stated that it felt bound neither by the FCC nor the Fourth Circuit decision which is the subject of this Petition. See Statement of Policy, Iowa State Commerce Commission, Docket No. RES 76-1, issued April 26, 1976.

must permit specialized carriers to provide particular intrastate telephone services, as well as the interstate services that the FCC has authorized the carriers to provide. *AT&T*, 56 F.C.C. 2d 14 (1975), *pet'n for review pending sub nom. California v. F.C.C.*, D.C. Cir. No. 75-2060 and consolidated cases.

II.

The Decision Below Nullifies Amendments to the Act Which Were Obtained by the States to Protect Their Jurisdiction Over Intrastate "Services" and "Facilities."

The state commissions would never have supported enactment of the Communications Act of 1934, and the legislative history of the Act shows it would never have been passed, if Section 2(b) and 221(b) had not been added to the Act for the express purpose of preserving the jurisdiction of the state commissions over local telephone charges, services, and facilities. As shown above (*supra*, p. 7, *et seq.*), for decades prior to 1934, the states had regulated local and intrastate service, the conditions of such service, the charges and rate structures applicable to such service, and the right to enter into the market for such service. The states and state commissions feared in 1934 that a newly-created FCC with jurisdiction over interstate communications might use its jurisdiction to preempt state regulation over local and intrastate communications service — the same way the Interstate Commerce Commission had used its powers to preempt state regulation of intrastate rail transportation. In the *Shreveport* case, *Houston East & West Texas Ry. v. United States*, 234 U.S. 342 (1914), the ICC's jurisdiction under the Interstate

Commerce Act to preempt state jurisdiction over intrastate railroad rates which were found to discriminate against interstate commerce had been upheld. In other cases, the ICC had assumed jurisdiction over intrastate transportation facilities, *e.g.*, *Railroad Commission of Ohio v. Hocking Valley Ry.*, 12 I.C.C. 398, 404 (1907); *Train Service on Northern Pacific*, 112 I.C.C. 191, 195 (1926).

Accordingly, because of the possibility that the FCC might attempt to expand its jurisdiction to include local and intrastate charges, services, facilities (as the ICC had done), representatives of the states strenuously opposed the original version of the bill as introduced in both the House and Senate. *Hearings on S. 6 Before the Senate Committee on Interstate Commerce*, 71st Cong., 1st Sess., 2167-68 (1930). Because of this opposition, the bills were amended by adding Section 2(b), which provided that nothing in the Act was to be construed to give the FCC jurisdiction over local and intrastate "charges, classifications, practices, services, facilities, or regulations."

With the addition of Section 2(b), the state commissions changed their position and supported the bill. John Benton, general solicitor of the National Association of Railroad and Utilities Commissioners, testified in favor of the amended bill as follows:

> "*Nobody suggests that the Federal Government ought to attempt to displace the State regulatory agencies in the regulation of intrastate telephone business*, yet there is danger that State regulation will be seriously hampered and broken down if care be not taken in the framing of any law providing

> for an active Federal commission, exercising jurisdiction in the communications field.
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> • • •
>
> "It is common knowledge that under the Interstate Commerce Act the power of the Interstate Commerce Commission has been so extended that State regulation of intrastate railroad rates has become little more than nominal.
>
> • • •
>
> "Unless the Congress wishes to bring control of *local telephone business, which is now subject to State regulation* under the domination of the new commission, it cannot merely transfer the existing power of the Interstate Commerce Commission to this new commission. It must describe the field within which the new commission shall operate.
>
> • • •
>
> "*This bill has been drawn with care to safeguard State power to regulate local telephone service.* It has been carefully considered by our executive and legislative committee representatives and has met their approval." Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 135-36 (1934). (Emphasis supplied.)

When this representative of the state commissions testified in support of the bill because it "has been drawn with care to safeguard State power to regulate local telephone service," he was talking about what became Sections 2(b) and 221(b), which had no parallel in the Interstate Commerce Act.

As Senator Dill, Chairman of the Senate Committee which favorable reported the bill, explained:

> ". . . [*A*]*t the request of the State Commission representatives, we wrote in certain provisions* which are not in the Interstate Commerce Act, *to protect the State commissions* against being overridden by this Commission [the FCC], as the Interstate Commerce Commission has overridden some of the railroad State commissions." Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 179 (1934) (emphasis supplied.)

The reports of both the Senate and House Committees explained that Sections 2(b) and 221(b) were intended to reserve to the states "exclusive jurisdiction" over local and intrastate communications. Senate Reports No. 781, 73d Cong., 2d Sess., p.3; House Report No. 1850, 73d Cong., 2d Sess., pp. 4, 7.[20]

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20. In explaining the bill to the Senate, Senator Dill stated:

> *"We have attempted in title I to reserve to the State commissions the control of intrastate telephone traffic.* We have kept in mind the fact that the Interstate Commerce Commission, through the *Shreveport decision and the decisions in other similar cases,* has gone so far in the regulation of railroads that the so-called 'State regulation' amounts to very little.
>
> *"We have attempted,* in this proposed legislation, *to safeguard State regulation* by certain provisions to the effect that where existing intrastate telephone *business* is being regulated by a State commission, the provisions of the bill shall not apply." (78 Cong. Rec. 8823 (1934)).

The only reason why Congress could conceivably have included the words "services" and "facilities" to the list of matters over which the FCC had no jurisdiction was because it intended to protect the jurisdiction of the state commissions over local and intrastate services and facilities fully as much as over local and intrastate rates.

Given this background of Sections 2(b) and 221(b) and the fact that these sections were added to the Act for the express purpose of safeguarding the jurisdiction of the state commissions over local and intrastate services and facilities, as well as charges,[21] a cruel hoax would now be perpetrated on the states if the Act were

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21. The court below recognized that the states had opposed the original version of the bill, citing the *Shreveport* case as an example of unwanted expansion of federal regulatory authority; but because *Shreveport* was a rate case, the court regarded the legislative history as demonstrating only that the states wanted to protect their jurisdiction over intrastate charges — not facilities used in intrastate service. (Pet. App. [13a, n. 6]) However, apart from the fact that Section 2(b) refers to "facilities" in the same phrase as "charges," the history of the 1934 Act shows that the states' concern was not limited to rates. Benton's testimony shows a concern to protect state jurisdiction over the intrastate telephone *"business,"* and over local telephone *"service."* (*Supra,* p. 36) Senator Dill likewise described the bill as reserving to the states "control of intrastate telephone *traffic,"* and as "safeguarding state regulation" over "intrastate telephone *business."* (*Supra,* p. 38) The National Association of Railroad and Utilities Commissioners' resolution opposed the bill as originally proposed because it would interfere with the powers of the states "to regulate local *service* of utilities which operate across State lines, including the rates for such service. . . ." *Hearings on S. 2910 Before the Senate Committee on Interstate Commerce,* 73rd Cong., 2nd Sess., p. 180 (1934).

to be construed as authorizing the FCC to preempt the state commissions with respect to terminal equipment interconnected to the local switched network and used predominantly for local and intrastate service.

III.

The Court Below Erred in Construing Section 2(b) So As To Fragment Jurisdiction and Regulatory Responsibility Over Intrastate "Charges, Classifications, Practices, Services, Facilities [and] Regulations."

A further reason why this Court should review the decision below is that the decision would permit the FCC to impair if not totally destroy the power of the state commissions to pursue their ratemaking policies so far as terminal equipment is concerned. Congress recognized that regulatory authority over "charges, classifications, practices, services, and facilities" used in connection with the predominant type of service (i.e. intrastate service) should not be fragmented between different levels of government. For this reason, it grouped these matters together in providing that nothing in the Act would give the FCC any such jurisdiction.

The court below erred in construing Section 2(b) so as effectively to read the word "facilities" out of Section 2(b). But equally if not more important, the court erred in assuming that jurisdiction over "charges" and "facilities" could practically be fragmented — with the FCC regulating facilities and entry into the terminal equipment market, and the state commissions regulating charges for local and intrastate service. The

court recognized that Section 2(b) was intended to protect the jurisdiction of the state commissions over "charges." (Pet. App. [13a,n.6]; see *supra*, p. 27) But the court failed to realize what Congress had understood — that jurisdiction over local charges and facilities cannot practically be fragmented, and that the state commissions must have jurisdiction over facilities and entry into the market for terminal equipment in order to effectuate state policies with respect to charges.

Prior to the advent of state regulation, local telephone companies engaged in unrestricted competition, which often resulted in two or three competing local exchanges. Such duplicative facilities required far more investment than was necessary to create an efficient telephone network. Also, the unregulated companies were free to serve whichever locations and customers they chose to serve, and free also not to serve the less profitable segments of the market. (*Supra*, pp. 8-9)

State regulation was instituted to avoid such wasteful duplication and assure service to the entire community. It was based on the principle that telephone companies are common carrier public utilities with an obligation to serve all segments of the public. State regulatory commissions were given the power and responsibility to regulate the prices of the various classes of telephone service, and also to limit entry into the telecommunications business in order to prevent unregulated competitors, who were not required to serve all segments of the public, from "skimming the cream" of the business. The state commissions generally exercised their powers to promote universal tele-

phone service to all residential customers and to implement pricing policies based on the value of service, rather than its cost — policies which have resulted in higher rates (in relation to costs) for urban and business subscribers than for residential subscribers and those in more sparsely-populated rural areas. (*Supra*, p. 13)

The FCC's order here appealed from would foreclose the states from pursuing their ratemaking policies so far as terminal equipment is concerned, and would create pressures leading inexorably to higher residential telephone rates. By preempting the states from exercising their regulatory jurisdiction, the FCC would disable them from limiting entry into the market for terminal equipment and service and would thus make it impossible for them to prevent "cream skimming" by the unregulated manufacturers. Thus, wholly apart from its erroneous premise that Congress intended the FCC rather than the states to regulate "facilities" interconnected to the local switched network, the court below erred in believing that any such fragmentation of jurisdiction rates and facilities is a practical possibility.

This Court has itself noted that unregulated competition undercuts state regulation, and particularly state rate-making policies; and it has expressly recognized the vital importance of construing federal statutes with "meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 517-518. (1947). In *Panhandle* this Court construed the Natural Gas Act so as to sustain state regulation over direct inter-

state sales of natural gas, as follows (332 U.S. at 520-521):

> "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. *It does not contemplate ineffective regulation at either level.* We have emphasized repeatedly that *Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. Public Utilities Comm'n v. Gas Co.*, 317 U.S. 456, 467; *Power Comm'n v. Hope Gas Co.*, 320 U.S. 591 609-610; *Interstate Gas Co. v. Power Comm'n*, 331 U.S. 682, 690 . . . . The scheme was one of co-operative action between federal and state agencies. It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, if those companies could divert at will all or the cream of their business to unregulated industrial uses.*

---

* Over 38 percent of the gross revenues of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies." (Emphasis supplied.)

See also *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951). Elsewhere this Court has affirmed that, "As a matter of

statutory construction, Congressional intention to displace local laws . . . is not, in general, to be inferred unless clearly indicated. . . ." *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940); and that, on the contrary, Congress has generally followed a policy of preserving state authority over "matters heretofore traditionally left to local custom or local law." *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 354 (1941).

Here, of course, resort to general principles of construction applicable to federal regulatory statutes should have been unnecessary, since Congress expressly protected state jurisdiction in Sections 2(b) and 221(b). This Court should thus grant certiorari in this case to make it clear that the Communications Act of 1934 was not intended to fragment regulatory authority over local and intrastate telephone "charges, classifications, practices, services, facilities, regulations," or to render and part of the authority of the state commissions "ineffective."

IV.

This Court Should Grant Certiorari to Vindicate Basic Principles of Federalism

At bottom, this case does *not* present any question as to whether competition rather than regulation with respect to terminal equipment is in the public interest. Rather, it presents the issue of which level of government — federal or state — is authorized, under the Communications Act of 1934, to decide what is in the interest of the public, which uses telecommunications service.

The decision of the court below appears to have

turned less on statutory language than on an unarticulated premise that any entity as large and complicated as our national telephone network somehow must be regulated in its entirety by a federal agency, rather than a multitude of state commissions. No premise could be further from the truth. Our national telephone network is, in fact, made up of hundreds of local telephone companies and exchanges, all with different markets, customer needs, and service problems. In 1934 these facilities were used approximately 98% of the time for local or intrastate calls; today approximately 97% of all calls are local or intrastate. In recognition of this fact, Congress attempted in Sections 2(b) and 221(b) to preserve state regulatory jurisdiction over this predominantly local variety of service. As already pointed out (*Supra*, p. 33), the FCC itself recently recognized that Congress in enacting the 1934 Act had properly decided that "the tail should not wag the dog" (*General Telephone Co.*, 14 F.C.C. 2d 695, 696 (1968).

We have in this country telephone communications systems of unsurpassed excellence and efficiency, and we have built and maintained these systems — since the very beginnings of the industry, and certainly in the four decades since 1934 — almost exclusively under state regulation. This record of state regulation of predominantly local and intrastate telecommunications service certainly compares favorably, to say the least, with the results of federal agency regulation of such predominantly interstate carrier services as railroad transportation and the airline industry.

The right of the states in our federal system to adopt policies reflecting local conditions and local views as to what promotes the public interest, and to

experiment in implementing these policies, should be preserved. Our system of government is founded on the belief that progress will most likely be achieved, and stagnation avoided, not by a single, monolithic government or governmental rule, but by a multitude of governments — with the states and local governments free to adopt policies reflecting local conditions and local views as to what promotes the public interest. This belief has nowhere been better expressed than by Mr. Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932):

> "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts. [Footnote omitted]
>
> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

This Court has vindicated[22] the views of Justice Brandeis and has emphasized the importance, in construing federal regulatory statutes, of protecting the regulatory powers of the state commissions. Thus, in *Connecticut Light & Power Co. v. F.P.C.*, 324 U.S. 515 (1945), this Court held that in enacting the Federal Power Act, Congress had preserved the power of the states to devise their own regulatory policies for dealing with local public utilities. In doing so, this Court emphasized the importance of state regulation as providing "laboratories" for testing regulatory policies (324 U.S. at 530):

> "But state lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed."
>
> * * *
>
> "Congress may think complete centralization of control of the electric industry likely to overtax administrative capacity of a federal commission. It may, too, think it wise to kep the hand of state regulatory bodies in this business, *for the 'insulated chambers of the states' are still laboratories where*

22. Although the *New State Ice* case has never expressly been overruled, the Supreme Court has recognized that Mr. Justice Brandeis' dissent, rather than the majority opinion, states the correct interpretation of the Due Process Clause and accurately describes the power of the States to regulate public utilities. See *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Breard* v. *Alexandria*, 341 U.S. 622, 630-33 (1951); *Fay* v. *New York*, 332 U.S. 261, 296 (1947). See also *Johnson* v. *Louisiana*, 406 U.S. 356, 376 n.16 (1972) (concurring opinion of Mr. Justice Powell).

many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment." (Emphasis supplied.)

Unless the decision below is reviewed by this Court and reversed, the state regulatory commissions will be handcuffed, and a single regulatory rule — or non-rule — will have been imposed by the FCC, without regard to possible variations in the state of technological development or economic vitality of local or state telephone companies, and without regard to the desirability of permitting each state to experiment in maintaining its own public policy.

Conclusion

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-331, 76-332, 76-336

No. 76-331

NORTH CAROLINA UTILITIES COMMISSION, ET AL., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents*

No. 76-332

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents*

No. 76-336

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS AERONAUTICAL RADIO, INC., AND AIR TRANSPORT ASSOCIATION OF AMERICA

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TABLE OF AUTHORITIES

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S. REP. No. 781, 73d Cong., 2d Sess. (1934) 12

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OPINIONS BELOW

The decision of the Court of Appeals appears at 537 F.2d 787 and is reprinted as Appendix A of each of the petitions. The Court of Appeals affirmed the decision of the Federal Communications Commission (FCC), 45 F.C.C.2d 204, which is reprinted as Appendix B to each of the petitions.

JURISDICTION

Petitioners seek review by this Court pursuant to 28 U.S.C. § 1254.

QUESTION PRESENTED

Aeronautical Radio, Inc. (ARINC) and the Air Transport Association of America (ATA) adopt and hereby incorporate the statement of the Question Presented appearing in the Brief of the Federal Communications Commission and the United States of America in Opposition (Government Brief).

STATEMENT

Rather than detail the procedural history of this case, ARINC and ATA adopt the Statement appearing in the Government Brief.[1] In addition, ARINC and ATA wish to supplement that Statement with a description of how long-standing FCC policies, affirmed in the decision below, have served the needs of the air transport industry for many years.

I. ARINC and ATA

ARINC was formed in 1929 by the airline industry at the suggestion of the Federal Radio Commission (the predecessor of the Federal Communications Commission) for the purpose of promoting the safety of flight by coordinating and assuring effective communications for the air transport industry. Thus, ARINC is a service company owned by the airline industry to

[1]ARINC and ATA also concur in and support generally the Briefs in Opposition submitted by the Government and the other Intervenor-Respondents which further delineate reasons why this Court should not issue a writ of certiorari to the Court of Appeals for the Fourth Circuit in this proceeding.

which it renders communications services on a not-for-profit basis.

The ATA is an association of the nation's scheduled airlines which are substantial users of the services provided by telephone companies as well as the principal users of ARINC's services.

II. The Use of the Telephone System by the Air Transport Industry

The communications services provided by the nation's many telephone companies are essential to safe and efficient air transport operations. In addition to being very substantial users of the switched public telephone system, the air transport industry is the largest non-government user of dedicated private line telephone service, which is provided by the telephone companies using essentially the same plant as is used for the public network. The air tranport industry uses a vast nationwide array of both public and private line communications channels to link together aircraft on the ground and in flight, administrative offices, ticket counters, computer centers, maintenance bases, and parts depots. The services used by the air transport industry include a vast system of private lines, many of which are connected to the basic switched network in order to communicate with the general public, for intercity voice and data communications linking some 3400 city-pairs nationwide, and a network of dedicated telephone lines which connect together a nationwide system of radio stations for communications between the ground and aircraft in flight.

The connection of a wide variety of telecommunications systems and equipment, owned either by indi-

vidual airlines or by ARINC, with lines provided by the telephone companies is essential to the industry's extensive communications operations. The use of such customer-provided terminal equipment is generally referred to as "interconnection."

For example, a private electronic switching system (ESS) established by ARINC and the airlines in 1963, handles the large volume of data relating to such essential information as aircraft dispatch, computerized flight plans, crew scheduling, reservations, and the like. ESS, located in Chicago, is interconnected with telephone company lines to over one thousand points all across the nation.

Similarly, the data terminals employed in connection with airline remote access computers are in large measure provided by the individual airlines and also are interconnected directly with the telephone system.

Air-ground communications service has also been dependent upon direct interconnection for effective operation since the late 1940's. Hundreds of remote aeronautical radio stations, dispersed to provide nationwide air-ground radio communications service, are operated from six ARINC-manned communications centers by means of private lines leased from the common carriers. These telephone lines must be connected directly to the remote radio transmitters and receivers. This interconnected equipment is all owned, operated, and maintained by ARINC and the airlines, and represents an investment of many millions of dollars.

Airline communications management as it has developed over the past quarter century must be handled on a national or regional level to assure that the overall

operations are integrated to the fullest extent practicable. Messages must be transmitted both within states and between states, often over facilities which depend on the interconnection of airline-provided terminal equipment with telephone company-provided communications services. In most cases, there is no feasible method to sort out commingled interstate and intrastate communications for different treatment.

For example, airline reservations offices use interconnected customer-provided automatic call distributors to route calls from the public to the next available agent. One reservations center may be used to serve the entire nation or a multi-state region, so both interstate and intrastate calls are continuously being received. For both operational and economic reasons, the automatic call distributor cannot be connected to receive only interstate or only intrastate calls.

As another example, airline dispatches must be sent with equal ease to aircraft through ARINC's air-ground communications centers regardless of whether the message is to an aircraft in the same state as the communications center or to one flying over a different state.

The sudden emergence in 1973 of state attempts to restrict needed interconnection to the common network would have, if permitted, reversed more than four decades of federal jurisdiction, effectively deprived the air transport industry of existing interconnection, and impeded the expansion of aeronautical telecommunications systems necessary to assure the safety of flight and to serve the traveling public.

ARGUMENT IN OPPOSITION TO CERTIORARI

I. There Are No Special and Important Reasons for Review by This Court

None of the factors identified in Supreme Court Rule 19(1)(b) for federal court of appeals cases meriting review on certiorari are presented here.

First, there is no conflict among the circuits; indeed, the only other circuit to consider the issue presented in this case also affirmed the FCC's interpretation of its jurisdiction. *St. Joseph Telephone & Telegraph Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1975), *aff'g per curiam Department of Defense* v. *General Telephone Co.*, 38 F.C.C.2d 803, *review denied*, F.C.C. 73-854 (1973). Moreover, the only state court which has squarely considered the issue has reached the same conclusion as the Fourth Circuit. *Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W.2d 531 (1975).[2]

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[2] In overturning a Nebraska Public Service Commission order which prohibited interconnection when no state authorization had been obtained, the Supreme Court of Nebraska cogently explained the disruptive effect of such an order:

> If Nebraska or any other state were to bar interconnection of customer-provided equipment for intrastate service in derogation of a federal rule, the telephone common carrier would be placed in the untenable position of having to violate either the state ruling or the federal ruling. If each state were to be free to establish its own rules governing interconnection for the purposes of intrastate services, uniform, non-discriminatory interstate services throughout the country would be made difficult, if not impossible. Because of the indivisibility of the nationwide telephone network, it is impossible from a practical, economic, and operating standpoint for a telephone common carrier to comply with conflicting federal and state regulations.

Sherdon v. Dann, 193 Neb. 768, 229 N.W.2d 531, 536 (1975).

In addition, the impact on users, such as the air transport industry, whose communications operations were dependent on the ability to interconnect, would have been to create a serious disruption of existing nationwide communications systems and a stifling of future developments.

[3] Exploratory hearings were held Sept. 28-30 by the House Interstate and Foreign Commerce Communications Subcommittee. *See* 42 TELECOMMUNICATIONS REPS. 8-29 (Oct. 4, 1976).

Second, this case does not involve an important question of federal law which should be settled by this Court, but merely an affirmation by the FCC of rulings consistently made for many years. (*See* pp. 8-11 *infra.*) In addition, the propriety of these rulings from a national policy standpoint is now under active consideration by Congress,[3] where legislation has been introduced which would, *inter alia*, establish "that the complete authority to regulate terminal and station equipment used for telephone exchange service shall rest with the States even though such terminal and station equipment also may be used in connection with interstate services." *E.g.*, H.R. 12323, 94th Cong., 2d Sess. (1976).

Third, the decision below was manifestly correct and in harmony with this Court's applicable decisions. (*See* pp. 11-13 *infra.*)

Finally, no question of state law or of judicial procedure is presented.

II. The FCC's Ruling, Affirmed by the Fourth Circuit, Is Consistent with Its Decisions Relating to Interconnection Dating Back Some Thirty Years and Does Not Present Any Questions of Unique Legal Importance.

The FCC's decision in the proceding below merely reiterates and recognizes the holdings of numerous decisions over the past thirty years, that the Commission has regulatory authority over the connection of terminal equipment to telephone plant used for interstate service regardless of the fact that the same plant also provides intrastate service. No novel issues are raised in petitioners' request that this Court suddenly review the FCC's long and consistent interpretation of the Communications Act that state regulation of local telephone service cannot block federal regulation of interstate telephone service.

In addition, over the years users, such as the air transport industry, have come to rely upon a uniform, national interconnection policy, and no purpose would be served by judicial reexamination of the carriers' long-discarded arguments in derogation of federal authority to adopt such policy.

The FCC first confronted and rejected challenges based on Sections 2(b) and 221(b) of the Communications Act to its specific authority over interconnection with facilities used for both interstate and intrastate services thirty years ago in *Use of Recording Devices,* 11 F.C.C. 1033, 1047 (1947).[4] There, the FCC disposed

[4] A similar challenge to FCC jurisdiction over construction of facilities used for both interstate and intrastate service was rejected almost forty years ago in Southwestern Bell Telephone Co., 6 F.C.C. 529 (1938). Despite the fact that less than 10% of the traffic over the new facilities would be interstate, the Commission rejected the telephone company's arguments that Sections 2(b)(1) and 221(b) deprived the Commission of jurisdiction. It held that "if the services and facilities of the carrier are interstate then . . . the Act is applicable." 6 F.C.C. at 534.

of the argument that Sections 2(b)(1) and 221(b) limit its authority over commonly used facilities with the crucial point that "[i]t ignores entirely the basic grant of jurisdiction to this Commission over interstate and foreign communication by wire or radio (see Communications Act, secs. 1 and 2 (a)) . . . ." The Commission also accurately observed that the adoption of a reading of Sections 2(b)(1) and 221(b) antithetical to FCC authority over common facilities, similar to the reading advanced by the petitioners here, would "remove practically all [Bell System] facilities from the jurisdiction of this Commission." *Id.* at 1048 n.12. Significantly, Bell acquiesced in the FCC's assertion of jurisdiction in 1947 and did not seek review.

Repeatedly in the ensuing years, the FCC reaffirmed its authority over common interstate and intrastate facilities.[5] Quite recently, the FCC expressly asserted interstate jurisdiction over a "dial restoration panel" used for both interstate and intrastate communications, and this holding was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *Department of Defense* v. *General Telephone Co.*, 38 F.C.C.2d 803, *review denied*, F.C.C. 73-854 (1973), *aff'd per curiam sub nom. St. Joseph Tele-*

[5] Katz v. American Tel. & Tel. Co., 43 F.C.C. 1328 (1953) (telephone facilities); Jordaphone Corp. v. American Tel. & Tel. Co., 18 F.C.C. 644 (1954) (answering devices); American Tel. & Tel. Co. (Railroad Interconnection), 32 F.C.C. 337 (1962) (teletypewriter station equipment); Department of Defense v. American Tel. & Tel. Co., 38 F.C.C.2d 819 (1970) (command post altering network). *See also* Referral of Chastain v. American Tel. & Tel. Co., 43 F.C.C.2d 1079 (1973) (mobile telephone); Fallon Travelodge v. Churchill County Tel. & Tel. Sys., 14 F.C.C.2d 972 (1968) (telephone set and automatic dialer); Hush-A-Phone Corp. v. American Tel. & Tel. Co., 20 F.C.C. 391 (1955) (privacy attachment).

phone & Telegraph Co. v. *FCC,* 505 F.2d 476 (D.C. Cir. 1974).

Because of the FCC's long-standing interpretation of its authority, the decision below has a relatively modest impact on existing services and, thus, gives rise to no need for review by this Court. Certain connections to the telephone have been permitted at least since 1957 under interstate and intrastate tariffs filed by telephone companies in compliance with the FCC's order in *Hush-A-Phone Corp.* v. *American Telephone & Telegraph Co.,* 22 F.C.C. 112 (1957).[6] In 1968, the FCC found unlawful tariff restrictions proscribing direct electrical connection which remained after *Hush-A-Phone* to the extent they prohibited interconnection without regard to whether such interconnection caused actual harm to the telephone network. *Carterfone,* 13 F.C.C.2d 420, *reconsideration denied,* 14 F.C.C.2d 571 (1968). In response to *Carterfone,* the telephone companies filed tariffs allowing the interconnection of customer-provided equipment, but only through a telephone company provided interface device. Pursuant to the liberalized interconnect tariffs filed in response to *Carterfone*, interconnection has been widely avail-

[6] No federal-state conflict developed because the telephone companies, recognizing the need for uniform regulations to govern intrastate use of the telephone instrument, incorporated the same revisions into their state tariffs, and these were accepted by the state regulatory authorities. *See, e.g.,* Peters Sunset Beach, Inc. v. Northwestern Bell Tel. Co., 60 P.U.R. 3d 363 (Minn. R.R. & Whse. Comm'n 1964), *aff'd,* Minn. Dist. Ct. 8th Dist., Case No. 8529 (Aug. 17, 1966). In that case, the state commission noted that a new paragraph had been added to its intrastate tariff in order to make the tariff substantially identical to the interstate tariffs filed with the FCC, and went on to hold that the tariff's prohibition of interconnections in that case was reasonable and lawful and consistent with *Hush-A-Phone.*

able to users such as the air transport industry for a number of years under both state and federal tariffs.

The FCC's *Telerent* decision merely clarifies the federal primacy principle already enjoying virtually universal respect in the states. Indeed, the Supreme Court of Nebraska recently acknowledged the preemptive force of the FCC's *Carterfone* decision and overruled one of the state actions that had originally prompted the *Telerent* ruling. *Sherdon* v. *Dann,* 193 Neb. 768, 229 N.W.2d 531 (1975).

In sum, the FCC's authority has been clearly defined for many years and substantial user interests have developed in reliance on FCC policy. The Fourth Circuit merely affirmed the established interpretation of the FCC's authority, and its decision does not merit further review.

III. The Decision of the Fourth Circuit Properly Analyzes the Extent of Federal Jurisdiction Granted to the FCC

The Fourth Circuit correctly rejected the argument that Sections 2(b)(1) and 221(b) of the Communications Act deprive the FCC of authority over facilities used in common for interstate and intrastate service.

Section 2(b)(1) provides only that the Commission shall not have direct regulatory jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate communication service* by wire or radio of any carrier." 47 U.S.C. § 152(b)(1)(1970) (emphasis added). As the Fourth Circuit held, Section 2(b)(1) should be read only to "deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not sub-

stantially affect the conduct or development of interstate communications." 537 F.2d at 793.

Similarly, Section 221(b) denies the Commission jurisdiction only over:

> charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone *exchange service*, or any combination thereof, even though a portion of such *exchange service* constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State Commission or by local governmental authority.

47 U.S.C. § 221(b) (1970) (emphasis added). The court below correctly concluded that this provision merely supplements Section 2(b) by permitting state regulation of strictly local exchange rates and services in a metropolitan area even though the exchange includes more than one state. 537 F.2d at 795.[7]

Petitioners seemingly would like the Court to read into Section 2(b)(1) the Section 221(b) qualification, "even though a portion . . . constitutes interstate or foreign communication." But to the contrary, the omission of this phrase in Section 2(b)(1) serves to underscore the intent of the draftsmen that only purely intrastate matters be exempted from FCC jurisdiction. This Section 221(b) qualification at most merely indicates that Congress knew how to draft broader exceptions, and consciously decided not to do so in Section 2(b). Thus, the only relevance of Section 221(b) to this case is that it supports the Fourth Circuit's interpretation of Section 2(b).

[7] The legislative history supports this limited view of § 221(b). *See* 78 Cong. Rec. 8823 (1934) (remarks of Senator Dill); *see also* S. Rep. No. 781, 73d Cong., 2d Sess. 5 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934); 78 Cong. Rec. 10314 (1934).

Nothing in either of these two provisions evidences the slightest Congressional intent to limit the Commission's jurisdiction over non-exchange interstate or foreign service in cases where facilities are used in common for interstate and intrastate service.

Moreover, the Fourth Circuit observed that the Section 410(c) provision for Federal-State Joint Boards with federal primacy was inconsistent with the purported Congressional design to deprive the FCC of authority over commonly used facilities. 537 F.2d at 794.

Petitioners do not deny that state restrictions on interconnection could make "compliance with both federal and state regulations . . . a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963). Consequently, under undisputed principles of federal preemption, the Fourth Circuit's ultimate approval of the FCC's primary authority over interconnection of terminal equipment with the national telephone network was correct and need not be reviewed by this Court. *Id.; Head* v. *New Mexico Board*, 374 U.S. 424 (1963).

CONCLUSION

For the above reasons, certiorari should be denied.

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and

THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

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FEDERAL COMMUNICATIONS COMMISSION

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THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

JOINT BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

QUESTION PRESENTED

Where the Federal Communications Commission, acting under the Communications Act of 1934, as amended, has validly required interstate communications common carriers to permit attachment of customer-provided terminal devices to interstate communications lines, may state regulatory commissions forbid such attachment to lines used for both interstate and intrastate communications?

STATEMENT OF THE CASE

This case has its genesis in a proposal by the North Carolina Utilities Commission to adopt a rule that in effect would have prohibited the attachment of customer-provided terminal equipment to the interstate telephone network if such equipment were also to be used for intrastate service. In a proceeding instituted in response to a petition by manufacturers and suppliers of terminal equipment, the implications of the North Carolina Utilities Commission proposal (and of actions of similar effect in Nebraska and Oklahoma) were carefully examined by the Federal Communications Commission (the "Commission" or "FCC"). The Commission, in a declaratory ruling, concluded that the "clear jurisdiction over interstate communications" vested in it by the Communications Act of 1934, as amended [1] (the "Act") required that it have "primacy in authority over the terms and conditions governing the interconnection of customer-provided equipment to the nationwide telephone network." [2] Although the Commission acknowledged that there was room for state action in the interconnection area consistent with federal requirements,[3] it determined

[1] 47 U.S.C. §§ 151 *et seq.*

[2] *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 220 (1974), *aff'd sub nom. North Carolina Util. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir. 1976).

[3] *Id.* at 221. In this regard, the Commission stated:

> "Although we have asserted federal primacy in this area, it does not follow that the State commissions have no proper interest or that they are to be denied a participating role and thus become merely onlookers to purely unilateral action by the FCC." *Id.* at 220.

The Commission noted that states could fully exercise their powers to investigate the effects of interconnection on telephone service and could provide additional options for customers with respect to interconnection. Two states, California and New York, have already done so. *See Investigation on Interconnection*, Calif. Pub. Util.

[Footnote continued on page 3]

that states necessarily are foreclosed from taking action that would contravene—and make it impossible to effectuate—the interconnection policies adopted by the FCC for the regulation of interstate telephone service.[4]

This result, the Commission reasoned, was required by the practicalities of providing service over the nation's single, integrated telephone network—a system characterized by a "commonality of telephone company plant and facilities used to provide intrastate and interstate services and the indivisibility of such plant and facilities, . . ." [5] Because of this commonality and indivisibility of plant and facilities, the Commission found that if its jurisdiction were not recognized as paramount, telephone users would

> "be subjected to a melange of regulations determined by each of 50 separate jurisdictions, as to the terms and conditions upon which they shall have access to and use of the telephone network for interstate services." [6]

[3] [Continued]
Comm'n, Decision No. 85791 (Case No. 9625 May 11, 1976); *Rochester Tel. Corp.*, 12 N.Y. Pub. Serv. Comm'n 1590 (1972).

The Commission has involved the states in interconnection investigations. Thus, in 1972, the Commission convened a Federal-State Joint Board, pursuant to Section 410 of the Act, 47 U.S.C. § 410, to investigate the question whether customer-provided interconnection should be liberalized beyond that permitted by the *Carterfone* decision, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968), and to make recommendations to the Commission based on its findings. *Proposals for New or Revised Classes of MTS and WATS*, 35 F.C.C.2d 539, 542 (1972). More recently, the Commission convened a Federal-State Joint Board to consider the impact of the use of customer-provided equipment on revenues received by local telephone companies through the separations/settlement process. 41 Fed. Reg. 50009 (November 12, 1976).

[4] 45 F.C.C.2d at 214.

[5] *Id.* at 218.

[6] *Id.* at 219.

Quoting from a decision of the District of Columbia Circuit, the Commission observed that "'fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication.'" [7]

The Fourth Circuit upheld the Commission's ruling on review.[8] In an opinion written by the late Judge Hastie,[9] the court rejected the contention that Section 2(b)(1) of the Act[10] (which reserves to the states jurisdiction over facilities used solely for intrastate communication) or Section 221(b)[11] (which deals with state jurisdiction over local telephone exchange service) deprives the Commission of authority to regulate facilities used jointly for interstate and intrastate service.[12] In so holding, the court observed that if state regulators could implement interconnection proposals that directly conflicted with FCC requirements in the area, the Commission would "be frustrated in the exercise of that plenary jurisdiction over the rendition of interstate and foreign

[7] *Id.* at 217 (quoting *General Tel. Co.* v. *FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969)).

[8] *North Carolina Util. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir. 1976).

[9] Because the other Fourth Circuit judges recused themselves, the panel consisted of Judge Widener from the Fourth Circuit, Judge Hastie from the Third Circuit, and Judge Tuttle from the Fifth Circuit.

[10] 47 U.S.C. § 152(b)(1).

[11] 47 U.S.C. § 221(b).

[12] The court was unwilling to accept the contention that Section 2(b) "sanctions . . . state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority . . . ." 537 F.2d at 793. Judge Widener, concurring in part and dissenting in part, did not differ from the majority regarding the effect of Section 2(b)(1); rather, he relied entirely on Section 221(b) for the view that the FCC does not have paramount jurisdiction over the interconnection of customer-provided equipment.

communication services that the Act has conferred upon it." [13] Accordingly, the court concluded that

> "the Commission's declaratory statement of its primary authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the Act." [14]

Petitioners now ask this Court to review the carefully considered decision of the court below and to upset a consistent pattern of decisions recognizing the Commission's jurisdiction reaffirmed in the present case.

REASONS FOR DENYING THE WRIT

Petitioners claim that the Commission's assertion of authority in the declaratory ruling exceeded its jurisdiction. They contend that the declaratory ruling departs radically from an established pattern of regulation, thereby drastically altering the congressional distribution of

[13] *Id.*

[14] *Id.* at 794. In support of this conclusion, the court found significant the Commission's early and repeated exercise of jurisdiction over facilities used jointly for both interstate and intrastate communication service and Congress' inaction for some thirty years in the face of that exercise or jurisdiction. *Id.* at 794-95. Only recently, primarily at the behest of American Telephone & Telegraph Co., has Congress begun to consider the jurisdictional question presented in this case. Since March of this year, several bills have been introduced in Congress for the purpose of establishing "that the complete authority to regulate terminal and station equipment used for telephone exchange service shall rest with the States even though such terminal and station equipment also may be used in connection with interstate services." *See, e.g.*, S. 3192, 94th Cong., 2d Sess. (1976); H.R. 12323, 94th Cong., 2d Sess. (1976). Hearings have already been held before the Communications Subcommittee of the House Committee on Interstate and Foreign Commerce, and the groundwork has been laid for further consideration of the legislation, including more hearings in the 95th Congress. "Bell Telephone Presses Case for Monopoly," 34 *Cong. Q.* 2615 (September 25, 1976).

power between state and federal agencies. This entirely distorts the facts, the law and the effect of the Commission's ruling. On numerous occasions in the last forty years, the Commission has asserted the authority which it reaffirmed in the declaratory ruling, and state regulation in the interconnection area, to the extent it has existed, has deferred to that authority. Affirmance of this authority by the court below was consistent both with the history of FCC actions in the area and with the decisions of other federal and state courts that have been confronted with the issue. Petitioners thus do not present for review a question on which the law is unsettled.

Perhaps in recognition of this, petitioners rely on the fact that this case involves a large quantity of telephone equipment as to which the FCC's jurisdiction has been sustained.[15] But this fact is irrelevant to the meritoriousness of the Petitions for Certiorari. As shown below, the Fourth Circuit's decision is both consistent with well established administrative practice and judicial decisions and clearly correct as a matter of law. Thus, petitioners have not presented a question that merits consideration by this Court.

I. The Decision Below Is Consistent Both with Long-Standing Administrative Practice and with Federal and State Court Decisions Dealing with the Jurisdictional Issue.

A. *The Commission Has Asserted the Authority Involved in the Present Case for Nearly Forty Years and No Court Has Questioned This Assertion of Authority.*

An examination of FCC decisions on the question presented here shows that the Commission has repeatedly asserted jurisdiction over facilities used for both interstate and intrastate service. In a 1938 case, *South-*

[15] Pet. No. 76-332 at 18, 20. (Hereafter "AT&T Pet.").

western Bell Telephone Co.,[16] the carrier argued that the Commission could not exercise authority over the construction of lines entirely between points within Texas because approximately 90% of the traffic over the lines would be intrastate. Setting the pattern that it was to follow in later years, the Commission rejected the suggestions that its jurisdiction was limited to joint facilities used "primarily" for interstate service and that its assertion of authority invaded the jurisdiction of state commissions in violation of Sections 2(b)(1) and 221(b).

In a 1947 decision, *Use of Recording Devices*,[17] the Commission applied this reasoning to resolve a question of jurisdiction over terminal attachments, the precise question involved in this case. In that case, as here, the carriers argued that Sections 2(b)(1) and 221(b) deprive the Commission of jurisdiction over facilities (such as terminal attachments) "which are used for both interstate and intrastate services . . . ." [18] As it had in 1938, the Commission rejected this contention, stating that, since interstate telephone service "requires the use of facilities that are not 'exclusively interstate,'" it had to have jurisdiction over facilities that are used in common for both interstate and intrastate service in order for its regulation of interstate service to be effective.[19]

The Commission repeatedly adhered to this position in the years that followed. Thus, in *Katz* v. *AT&T*,[20] the Commission rejected the telephone company's contention that termination of service over facilities used for inter-

[16] 6 F.C.C. 529 (1938).

[17] 11 F.C.C. 1033 (1947).

[18] *Id.* at 1046.

[19] *Id.* at 1047.

[20] 16 F.C.C. 421 (1951), *rehearing denied*, 43 F.C.C. 1328 (1953).

state and intrastate communication was a matter that should be left to regulation by local agencies:

> "Were the Commission to exercise its jurisdiction only where the telephone facilities in question were exclusively interstate in character, it would result in virtually complete abdication from the field of telephone regulation by the Commission." [21]

The Commission's position remained steadfast in actions subsequent to *Katz*,[22] culminating in the 1968 *Carterfone* decision.[23]

In *Carterfone*, the Commission generalized its earlier exercise of authority over interconnection matters by requiring the carriers to remove from their interstate tariffs all prohibitions against the attachment of noncarrier-supplied apparatus even though the practical effect of this action was to remove such prohibitions in connection with intrastate service as well.[24] *Carterfone* was not

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[21] 43 F.C.C. at 1332 (denying rehearing).

[22] *See Jordaphone Corp.* v. *AT&T*, 18 F.C.C. 644 (1954); *AT&T (Railroad Interconnection)*, 32 F.C.C. 337, 339 (1962); *AT&T (TWX)*, 38 F.C.C. 1127 (1965).

Petitioners attempt to distinguish *AT&T (TWX)* as involving equipment predominantly interstate in use and not pertaining to telephone exchange service. AT&T Pet. at 31 n.43. However, this distinction is clearly groundless since in *Southwestern Bell Tel. Co.*, *supra*, *Use of Recording Devices*, *supra*, and *Katz* v. *AT&T*, *supra*, the Commission had already asserted jurisdiction over facilities that were predominantly intrastate in their use and pertained to exchange service.

[23] 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968). As early as *Carterfone*, the Commission made clear that its jurisdiction extended to a wide range of terminal devices: "In view of the unlawfulness of the tariff there would be no point in merely declaring it invalid as applied to the Carterfone and permitting it to continue in operation as to other interconnection devices." *Id.* at 425.

[24] Petitioners attempt to distinguish *Carterfone* and the Commission's earlier decisions on the ground that the FCC's assertion of jurisdiction in those cases was limited to use of the equipment

appealed by the carriers or the states, and in its post-*Carterfone* decisions, the Commission continued to assert jurisdiction in circumstances where both interstate and intrastate service was necessarily involved.[25] Its most recent decision in this area, rejecting the argument that Section 2(b)(1) deprives it of jurisdiction over charges for dial restoration panels [26] used for intrastate as well as interstate communication, was affirmed by the District of Columbia Circuit.[27]

As the foregoing discussion demonstrates, the declaratory ruling in the present case is simply one more link

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for interstate and foreign operations. AT&T Pet. at 31 n.43. The distinction is spurious, for in the present case, as in *Carterfone* and its earlier decisions, the Commission has asserted jurisdiction only over equipment used for interstate service, and the states have been precluded only from acting in ways that would directly frustrate exercise of that jurisdiction. Although this may have a practical impact upon state regulation of intrastate service, the same was true in *Carterfone* and the earlier cases. There, as here, the equipment at issue was attached to facilities used for intrastate as well as interstate service, and the Commission's order had, of necessity, a direct impact upon intrastate uses of the equipment. Thus, *Carterfone*, for example, resulted in the filing of new state tariffs to conform to the FCC's ruling applicable to interstate tariffs.

[25] Thus, in *Fallon Travelodge*, 14 F.C.C.2d 972 (1968), the Commission, on the basis of *Use of Recording Devices*, *supra*, and other decisions, considered a complaint for delay in providing certain special purpose terminal equipment, even though the equipment could be used interchangeably to make interstate and intrastate calls. And in *Johnson*, 18 F.C.C.2d 679 (1969), the Commission considered a complaint for wrongful discontinuance of service despite arguments that it lacked jurisdiction because the carrier's action involved termination of intrastate telephone exchange service as well as interstate service.

[26] Dial restoration panels, which are installed at control centers and sites within the country's Air Defense Command, are terminal facilities which permit quick manual restoration of interrupted communication circuits by rerouting transmissions.

[27] *United States Dep't of Defense* v. *General Tel. Co.*, 38 F.C.C.2d 803, *review denied*, FCC 73-854 (1973), *aff'd per curiam sub nom. St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974).

in an unbroken chain of decisions by the Commission asserting jurisdiction over facilities used for interstate communication, even though the same facilities are used, to a great degree, for intrastate communication as well.[28] The petitioners' challenge to the FCC's declaratory ruling is thus nothing more than a rearguard effort to oust the Commission of jurisdiction to which it has consistently laid claim for almost forty years.[29]

As shown below, apart from the actions that precipitated the declaratory ruling in this case, state authorities have acquiesced in this assertion of Commission jurisdiction. Moreover, no federal or state court has questioned this assertion of authority by the Commission. To the contrary, the courts have taken positions in support of the Commission's jurisdiction in this area. Thus, in *Hush-A-Phone Corp.* v. *United States*,[30] the District of Columbia Circuit required the Commission to investigate the reasonableness of a carrier tariff restriction prohibiting the attachment of devices that were not furnished by the telephone company. More recently, that same court affirmed the Commission's determination in *United States Department of Defense* v. *General Telephone Co.*,[31] that the terminal equipment used jointly for interstate and

[28] Such jurisdiction has been asserted not only in connection with the attachment of terminal equipment (*see Use of Recording Devices, supra; Jordaphone Corp.* v. *AT&T, supra; AT&T (Railroad Interconnection), supra; Carterfone, supra*), but also with respect to the interstate service furnished through the use of such equipment (*see Katz* v. *AT&T, supra; Fallon Travelodge, supra; Johnson, supra*) and the rates charged for the use of such equipment in interstate service (*see AT&T (TWX), supra; United States Dep't of Defense* v. *General Tel. Co., supra*).

[29] In light of this consistent pattern of Commission decisions asserting jurisdiction, it is difficult to understand the petitioners' unsubstantiated reference to "the FCC's own prior precedents to the contrary . . . ." AT&T Pet. at 31.

[30] 238 F.2d 266 (D.C. Cir. 1956).

[31] 38 F.C.C.2d 803, *review denied*, FCC 73-854 (1973).

intrastate communication service in that case was subject to FCC jurisdiction.[32] Similarly, the only state court that appears to have considered the question has also upheld the Commission's primacy in regulation of interconnection equipment.[33]

In short, far from creating a state of confusion, the decision below is fully consistent with a long-standing pattern of administrative practice—supported by the courts[34]—upholding the authority that the Commission reaffirmed in its declaratory ruling. The Commission's

[32] *St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974).

[33] *Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W.2d 531 (Neb. Sup. Ct. 1975). In that case, the Nebraska Supreme Court overturned a Nebraska Public Service Commission order which prohibited interconnection when no state authorization had been obtained. In so doing, the court explained:

> "If each state were to be free to establish its own rules governing interconnection for the purposes of intrastate services, uniform, non-discriminatory interstate services throughout the country would be made difficult, if not impossible." *Id.* at 536.

[34] *Kitchen* v. *FCC*, 464 F.2d 801 (D.C. Cir. 1972), relied on by petitioners, AT&T Pet. at 28, does not question the jurisdiction that the Commission has asserted here. *Kitchen* involved an effort by environmentalists to prevent the construction of a building to house local exchange switching equipment by requiring the FCC to assume jurisdiction and file a statement under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* The Commission declined to require pre-construction certification of the building under Section 214 of the Act, 47 U.S.C. § 214, which prohibits carriers from constructing a "new line" without first securing a certificate of public convenience and necessity from the Commission. In a *per curiam* opinion, the court declined to compel the Commission to require Section 214 certification in these circumstances. It noted that a substantial question existed as to whether the building at issue could be considered part of a "line" within the meaning of Section 214. In effect the case involved what was essentially a local zoning dispute that had already been the subject of extensive hearings before appropriate state agencies and the resolution of which was not, in any event, found to have any effect upon communications facilities used in interstate service.

decision to exercise this authority in order to achieve the objectives of the Act is, under well-settled principles of law, entitled to the greatest deference.[35]

B. *The States Have Historically Deferred to the Commission's Authority in this Area.*

Contrary to petitioners' assertions, the Commission's declaratory ruling does not represent an invasion of what has long been a regulatory preserve of the states. For one thing, the history of state regulation in this area is hardly what petitioners would have it appear. Petitioners list several decisions ostensibly establishing a history of state regulation.[36] Of the fourteen decisions listed, more than half predate enactment of the Communications Act and thus shed no light on the division of regulatory authority that Congress established in the Act. The remaining decisions are no more supportive of petitioners' position, for an examination of state regulatory practices subsequent to 1934 reveals a pattern of deference by the states to tariffs filed by the utilities in conformity with interstate tariffs previously filed with the FCC. In effect, state regulatory agencies, recognizing the need for uniformity of regulation and the primacy of federal authority, have deferred to the Commission-sanctioned tariffs.[37]

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[35] *See United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *General Tel. Co.* v. *FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

[36] AT&T Pet. at 21 n.33.

[37] After the Commission's order in *Carterfone*, for example, AT&T sought and received from the Commission an extension of time within which to file *Carterfone*-implementing tariff modifications in each state to make the state tariffs consistent with its interstate and foreign tariffs. 15 F.C.C.2d 31 (1968). Similarly, after the Commission's order in *Hush-A-Phone Corp.*, 22 F.C.C. 112 (1957),

Because of this deference, the Commission, which has long asserted jurisdiction over facilities used jointly for interstate and intrastate service, did not, until recently, find it necessary specifically to preempt particular aspects of state regulation of interconnection. Thus, the fact that the Commission did not preempt state action in this area before its ruling in this case does not reflect a recognition of primary state authority and does not foreclose a succeeding exercise of federal authority in an area where that authority is paramount.[38] Accord-

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AT&T filed amendments to all of its state tariffs in order to make them consistent with the interstate filings. Indeed, one of the more recent cases cited by petitioners in support of their position that the states have regulated terminal facilities in a plenary fashion recognizes the secondary role actually played by the states. In *Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.*, 60 P.U.R.3d 363, 367 (Minn. R.R. & Whse Comm'n 1965), *aff'd.* Minn. Dist. Ct. 8th Dist., Case No. 8529 (1966), a telephone service subscriber challenged a state tariff prohibiting interconnection of a private intercommunications system. Commenting on that tariff, the state commission stated:

> "It was modified in 1958 by the addition of Paragraph 'a,' because of the decision in *Hush-A-Phone Corp.* v. *United States* (1956), and subsequent proceedings of the Federal Communications Commission. These tariffs which cover intrastate telephone service are substantially identical to comparable tariffs filed by respondent and the other companies of the Bell System with the Federal Communications Commission which cover interstate telephone service." (Citations omitted.)

[38] "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise." *FTC* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941).

Petitioners argue that "state and local control over matters long regulated at that level should not be superseded without the clearest expression of Congressional intent." AT&T Pet. at 35. Their argument, however, assumes that state and local control in the interconnect area has been exclusive of federal control, when in fact, it is concurrent jurisdiction that has long been exercised. Thus petitioners overlook the fact that whatever may have been the extent of state regulation, that regulation, from the enactment of the Communications Act until now, has been entirely harmonious with, and indeed, deferential to, federal interstate requirements. Under the Act, it could not have been otherwise. Accordingly, though a contrary

ingly, when state policies raised the prospect of direct conflict with federal policies in the field of interconnection, the Commission properly resolved the conflict in accordance with the most rudimentary principles of federal supremacy.[39]

II. The Decision Below Correctly Upheld the Commission's Determination that its Statutory Jurisdiction Over Interconnection of Terminal Equipment Used for Interstate Telephone Service Precludes Conflicting State Action that Would Frustrate Achievement of Federal Policy in the Area.

As set forth in Section 1 of the Act, the FCC was created for the purpose of

> "regulating interstate and foreign . . . communication by wire and radio so as to make available, so far as possible, . . . a rapid, efficient, Nation-wide, and world-wide . . . communication service with adequate facilities at reasonable charges . . . ." [40]

assertion of state authority must yield to federal requirements, *see Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Head* v. *New Mexico Bd. of Examiners*, 374 U.S. 424, 430 (1963), the authority of states to act in the area of interconnection has not been superseded. Rather, states have been limited to implementing policies that are not inconsistent with federal policy.

[39] It is well settled that where there is a conflict between federal and state regulatory policies such that enforcement of both would impair superintendence of the field by the federal agency and frustrate achievement of the objectives of congressional legislation, the state policy must yield, so long as the federal agency is acting within its jurisdiction. *See Florida Lime & Avocado Growers, Inc.* v. *Paul, supra; Head* v. *New Mexico Bd. of Examiners, supra; id.* at 444-45 (Brennan, J., concurring). This is precisely such a case, for the conflict between a state policy *prohibiting* interconnection of customer-provided equipment and a federal policy *requiring* that interconnection of such equipment be permitted could hardly be more clear-cut.

[40] 47 U.S.C. § 151. The Act was passed in response to what was perceived as a "vital need for one commission with unified jurisdic-

Although Congress could not foresee all developments in the communications field, it clearly intended to grant the Commission the extensive authority required for effective regulation, including such authority as was necessary to accommodate future developments.[41]

To achieve these objectives, Section 2(a) of the Act,[42] grants the Commission regulatory authority over "all interstate and foreign communication by wire or radio . . . ." Section 3 of the Act makes clear that this authority extends to "all instrumentalities, facilities, apparatus, and services . . . incidental to [interstate or foreign communication]." [43] This broad grant of authority is co-extensive with the comprehensive purposes of the Act. Thus, regulation of the interconnection of terminal facilities used for interstate communication service is plainly encompassed within the basic jurisdictional grant of Sections 2(a) and 3.

To be sure, Congress did make certain exceptions to the exercise of the Commision's broad jurisdiction. In particular, Section 2(b)(1) of the Act withholds from the Commission "jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication

tion over all . . . methods of communication . . . ." S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934). The Senate Report stated:

> "Under existing provisions of the Interstate Commerce Act the regulation of the telephone monopoly has been practically nil. This vast monopoly which so immediately serves the needs of the people in their daily and social life must be effectively regulated." *Id.* at 2.

[41] *See United States* v. *Southwestern Cable Co.*, 392 U.S. at 172-73; *General Tel. Co.* v. *FCC*, 413 F.2d at 398.

[42] 47 U.S.C. § 152(a).

[43] *Id.* § 3(a), (e), (f).

service by wire or radio of any carrier . . . ." [44] Similarly, Section 221(b) denies the Commission

> "Jurisdiction, with respect to charges, classifications, practices, services, facilities or regulations for or in connection with . . . telephone exchange service, . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority." [45]

While these provisions do impose certain limitations on the Commission's jurisdiction, they do not, either explicitly or implicitly, deprive the Commission of jurisdiction to regulate equipment used directly for interstate telephone service even though such equipment may be used for intrastate service as well.

Petitioners contend otherwise. But their position not only reads into the Act a restriction that the statutory language does not support; [46] it also requires a construction that would hopelessly impair the Commission's ability to discharge its responsibilities under the Act—particularly its obligation to insure the availability of "adequate facilities at reasonable charges." [47] By denying the

[44] *Id.* § 152(b)(1).

[45] *Id.* § 221(b).

[46] If petitioners were correct in asserting that Section 2(b)(1) deprives the Commission of jurisdiction over any facility used for intrastate as well as interstate communication service, Section 221(b)'s reservation to the states of jurisdiction over facilities used in connection with telephone exchange service would have been superfluous since the jurisdictional limitation would already have been established by Section 2(b)(1).

[47] 47 U.S.C. § 151. As this Court has observed, " 'in the absence of compelling evidence that such was Congress' intention . . . [courts should not] prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' " *United States* v. *Southwestern Cable Co.*, 392 U.S. at 177 (quoting *Permian Basin Area Rate Cases*, 390 U.S. at 780).

Commission's authority over the bulk of equipment used for interstate service, petitioners' construction of the Act would raise the distinct possibility that customer-provided terminal attachments approved (or required) for use in one state would not be compatible with comparable equipment approved (or required) for use in other states. It was precisely such a situation that Congress sought to avoid when it created the FCC. Thus, as the court below concluded, the Commission must retain jurisdiction

> "to determine what terminal equipment can safely and advantageously be interconnected with the interstate communications network and how this shall be done." [48]

Reading the Act to preserve Commission jurisdiction over facilities used jointly for interstate and intrastate service gives proper recognition to the effect of Sections 2(b)(1) and 221(b) and is consistent with the legislative history. Although Sections 2(b)(1) and 221(b) do reserve certain aspects of telephone regulation to the states, they were not intended to oust the FCC of jurisdiction necessary for the effective discharge of its statutory responsibilities. Rather, as the court below explained,

> "the purpose of Section 2(b) is to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." [49]

[48] 537 F.2d at 793.

[49] *Id.* at 794 n.6. The fact that the jurisdictional limitations of Sections 2(b)(1) and 221(b) are made subject specifically to Section 301, 47 U.S.C. § 301, is viewed by petitioners as confirmation that the Section 2(b)(1) and 221(b) restrictions override every other jurisdictional grant in the Act. AT&T Pet. at 27-28. This view is patently incorrect. Section 301 generally establishes the

Section 2(b)(1) does not sanction state actions that frustrate implementation of federal policies that have been formulated in the direct discharge of the Commission's statutory responsibilities to insure effective and efficient interstate service.[50]

Contrary to petitioners' contention, the portion of the legislative history which reflects concern that the so-called "*Shreveport*" decision[51] not be extended to the

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licensing requirement for radio communication, an area in which, as petitioners themselves recognize, Congress intended FCC authority to extend "even beyond interstate communication to intrastate radio transmission that may merely interfere with interstate uses . . . ." AT&T Pet. at 33. Thus, the overriding effect of Section 301 on Sections 2(b)(1) and 221(b) means simply that operation of all radio equipment, even radio equipment *used solely for intrastate service*, falls within FCC regulatory jurisdiction, whereas wire telephone equipment used solely for intrastate service does not. The FCC decision at bar, of course, does not seek to exert jurisdiction over equipment used solely for intrastate service.

[50] The purpose of Section 221(b) is to preclude the assertion of FCC jurisdiction over charges or facilities "for or in connection with . . . telephone exchange service" when the only basis for federal interest is that "a portion of such exchange service constitutes interstate or foreign communication . . . ." The legislative history makes clear that Section 221(b) was enacted to deal with a specific and narrow problem arising from the fact that a few metropolitan areas in the United States straddle state lines and the local exchanges in such areas serve portions of more than one state. Since Congress wished to preserve state authority over purely local exchange service, it provided in Section 221(b) that such service remains in state, rather than federal, control even though the service is literally interstate in nature. *See* 78 Cong. Rec. 10314 (June 2, 1934) (remarks of Congressman Rayburn); 78 Cong. Rec. 8823, 10012 (May 15 and June 9, 1934) (remarks of Senator Dill). Contrary to the view expressed by Judge Widener, dissenting below, Section 221(b) was never intended to remove the FCC's jurisdiction, as granted in Section 2(a), over facilities used to communicate with out-of-state points *beyond* the boundaries of the telephone exchange as well as within those boundaries.

In view of the clear teaching of this history it is not surprising that in its oral argument before the Commission in this case AT&T abandoned any reliance upon Section 221(b). Trans. at 102-03.

[51] *Houston, E. & W. Texas Ry.* v. *United States*, 234 U.S. 342 (1914).

field of communications is wholly consistent with the reading of the Act by the Commission and the court below. *Shreveport* was viewed as sanctioning an exercise of federal authority over intrastate rail rates predicated solely upon the *indirect effect* that those rates might have on interstate rail transportation.[52] In contrast to *Shreveport*, in the present case the Commission has asserted authority to regulate only facilities used *directly* in interstate communication service and to preclude conflicting state policies that would impair FCC regulation of such service. Thus, the Commission's action here does not constitute an assertion of jurisdiction comparable to that involved in *Shreveport*.

In sum, reading the Act so as to permit the exercise of FCC authority over equipment used in common for interstate and intrastate communication service gives proper recognition to all the statutory language, serves the purposes of the Act and is fully consistent with the legislative history. Petitioners' opposite view is an effort to parlay the limited purposes of Sections 2(b)(1) and 221(b) into an emasculation of the regulatory powers specifically granted the Commission to achieve the objectives clearly stated by Congress in the Act itself.[53] The Act must not be read to withdraw with one hand the authority that it grants with the other—authority necessary to assure the compatibility demanded by an efficient and effectively functioning nationwide communications system.

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[52] *See Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 134, 136, 145 (1934); *Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 153, 155, 156, 179 (1934).

[53] "Since provisos and exceptions in statutes are intended to restrain or except that which otherwise would be within the scope of the general language, they must be strictly construed and limited to objects fairly within their terms." *Rochester Tel. Corp.* v. *United States*, 23 F. Supp. 634, 636 (W.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939) (construing Section 2(b)).

CONCLUSION

For the reasons stated above, this Court should not issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NORTH CAROLINA UTILITIES COMMISSION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 537 F.2d 787. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 1b-41b) is reported at 45 FCC 2d 204.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1c-2c) was entered on April 14, 1976. The court of appeals denied petitions for rehearing and rehearing *en banc* on June 8, 1976 (Pet. App. 1d-2d). The petitions for a writ of certiorari were filed on September 3, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission's policy (adopted pursuant to the Communications Act of 1934) governing the interconnection of customer-provided equipment with the interstate telephone network precludes state adoption of inconsistent regulatory policies for such interconnections with the same facilities.

STATEMENT

Introduction

Telephone terminal equipment (which includes ordinary telephone sets as well as sophisticated switchboards and data communications facilities) serves

[1] "Pet. App." refers to the appendix in No. 76-332.

both interstate and intrastate functions. The same piece of equipment is used to send or receive local calls, intrastate long distance calls, interstate calls, and international calls. This is so because the national telephone network comprises all the local exchange areas in the country linked together by interexchange or long distance lines.

Two regulatory authorities, federal and state, oversee communications services and facilities. In a broad sense, the federal authority (the Federal Communications Commission ("FCC")) regulates interstate and foreign services, including the facilities used to provide those services; the state authorities (including the petitioner North Carolina Utilities Commission) regulate local exchange and intrastate toll services, including the facilities used to provide those services. This case arises from the FCC's resolution of a dispute as to which of the regulatory authorities is paramount in the circumstance where both have policies governing the interconnection of equipment to the telephone system and where the policies are irreconcilable. The FCC concluded that in such circumstances the federal responsibility for the interstate telephone network must prevail. The court of appeals affirmed.

A. The Statutory Scheme

In the Communications Act of 1934, 48 Stat. 1064 *et seq.*, as amended, 47 U.S.C. 151 *et seq.*, Congress created the FCC, with authority to regulate "interstate and foreign commerce in communication by wire and radio," and directed the agency to make

available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *." Section 1, 47 U.S.C. 151. The grant of jurisdiction covers not only the transmission of interstate and foreign communications, but also "all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission." Section 3(a), (b), (e), (f), 47 U.S.C. 153(a), (b), (e), (f).

The Act contemplates dual regulation of wire communications.[2] It expressly reserves state jurisdiction over purely intrastate matters, Sections 2(b), 221(b), 47 U.S.C. 152(b), 221(b); at the same time it specifically gives the FCC authority for certain regulatory purposes over all carriers who engage in interstate communications, including those who do so only through interconnection with other carriers, 47 U.S.C. 152(b). Under this regulatory scheme, such "connecting carriers", subject to state regulation in their roles as intrastate companies, are subject also to Sections 201 through 205 of the Communications

[2] The Act provides for consultation between the FCC and state regulatory commissions on matters of joint concern, Section 410, 47 U.S.C. (Supp. V) 410, and for the convening of a Federal-State Joint Board to consider proceedings concerning the separation of common carrier property and expenses between interstate and intrastate operations, and other proceedings that may be referred to it by the FCC. Section 410(c), 47 U.S.C. (Supp. V) 410(c). But the federal responsibility remains paramount; the Joint Board prepares a recommended decision for action by the FCC, and although state members of the Board may participate in the FCC deliberations on the recommendation, they may not vote on it. *Ibid.*

Act, the major substantive provisions of the common carrier title of the Act. 47 U.S.C. 152(b), 201-205.[3] By virtue of their participation in interstate service through interconnection, virtually all of the nation's telephone companies come within the FCC's regulatory jurisdiction under Sections 201 through 205.

B. FCC Regulation of Equipment Interconnection

The FCC and state regulatory agencies have coexisted under this scheme for more than 40 years. Common carriers have raised jurisdictional challenges to the FCC from time to time, particularly in cases involving facilities used jointly for interstate and intrastate communications. But the Commission has consistently exercised its jurisdiction insofar as the facilities are used interstate, recognizing that the states have concurrent jurisdiction to regulate the use of the same facilities for intrastate communications when the state regulations do not conflict with federal ones.[4] The courts have uniformly upheld the

[3] Section 201 requires carriers to furnish service on reasonable request, to interconnect with other carriers on FCC order, and to adopt rates, practices and regulations that are just and reasonable. Section 202 forbids unjust or unreasonable discrimination. Section 203 requires fully subject carriers to file schedules (tariffs) setting forth rates and practices for themselves and their connecting carriers. Sections 204 and 205 set forth the FCC's authority and procedures for scrutiny of tariffs and for the prescription of rates and practices binding on fully subject carriers and connecting carriers alike.

[4] See, *e.g.*, *AT&T (Mebane)*, 53 FCC 2d 473, affirmed *sub nom. Mebane Home Tel. Co.* v. *Federal Communications Commission*, 535 F.2d 1324 (C.A. D.C.); *Department of Defense*

FCC's exercise of this jurisdiction.[5] The FCC has thus from its inception regulated terminal equipment used in connection with the interstate network. In particular, it has established policies governing interconnection of that equipment with the network.[6]

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v. *General Tel. Co.*, 38 FCC 2d 803, affirmed *sub nom. St. Joseph Telephone & Telegraph Co.* v. *Federal Communications Commission*, 505 F.2d 476 (C.A. D.C.); *Carterfone*, 13 FCC 2d 420, reconsideration denied, 14 FCC 2d 571, on primary jurisdiction referral, *Carter* v. *AT&T*, 250 F. Supp. 188 (N.D. Tex.), affirmed, 365 F.2d 486 (C.A. 5), certiorari denied, 385 U.S. 1008; *Hush-A-Phone Corp.* v. *AT&T*, 22 FCC 112, on remand from *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (C.A. D.C.); *Use of Recording Devices*, 11 FCC 1033, as modified, 12 FCC 1005; *Jordaphone Corp. of America* v. *AT&T*, 18 FCC 644; *Katz* v. *AT&T*, 43 FCC 1328; *AT&T (TWX)*, 38 FCC 1127; *AT&T (Railroad Interconnection)*, 32 FCC 337; *Fallon Travelodge* v. *Churchill County Tel. & Tel. System*, 14 FCC 2d 972; *Department of Defense* v. *AT&T (COPAN)*, 38 FCC 2d 819.

[5] See, *e.g.*, *AT&T (Mebane)*, *supra*; *Department of Defense* v. *General Tel. Co.*, *supra*. Cf. *Ambassador, Inc.* v. *United States*, 325 U.S. 317; *GTE Service Corp.* v. *Federal Communications Commission*, 474 F.2d 724 (C.A. 2); *General Tel. Co. of the Southwest* v. *United States*, 449 F.2d 846 (C.A. 5); *General Tel. Co. Calif.* v. *Federal Communications Commission*, 413 F.2d 390 (C.A. D.C.), certiorari denied, 396 U.S. 888; *Ward* v. *Northern Ohio Tel. Co.*, 300 F.2d 816 (C.A. 6), certiorari denied, 371 U.S. 820; *Hush-A-Phone Corp.* v. *United States*, *supra*; *MCI Communications Corp.* v. *AT&T*, 369 F. Supp. 1004 (E.D. Pa.), vacated on other grounds, 496 F.2d 214 (C.A. 3); *United States* v. *AT&T*, 57 F. Supp. 451 (S.D. N.Y.), affirmed *sub nom. Hotel Astor, Inc.* v. *United States*, 325 U.S. 837.

[6] The substantive interconnection policy, which, as petitioners concede, is not at issue in this case (Pet. No. 76-332,

The telephone companies have recognized that authority. They typically have filed equipment interconnection tariff restrictions (formerly known as "foreign attachment" provisions) with the FCC, and have filed conforming tariff provisions with the state or local agencies concerned. *E.g.*, *Carterfone*, 14 FCC 2d 149, stay granted 15 FCC 2d 31; *Telerent Leas-*

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p. 10; see Pet. No. 76-331, p. 2; Pet. No. 76-336, p. 2), is based on Section 201(b) of the Communications Act, 47 U.S.C. 201(b), which requires that charges, practices and regulations governing interstate communications be "just and reasonable." Section 201(b) gives rise to a right in telephone subscribers "reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." *Hush-A-Phone Corp.* v. *United States*, 238 F. 2d 266, 269 (C.A. D.C.). While early Commission precedent on interconnection recognized this right (*e.g.*, *Use of Recording Devices*, 11 FCC 1033), it received its most vigorous statement in the 1968 decision in *Carterfone*, 13 FCC 2d 420, reconsideration denied, 14 FCC 2d 571. The Commission there held that AT&T's tariff provision barring customers from interconnecting devices was an unreasonable restraint on customer freedom. *Carterfone* established the customers' right to interconnect their own equipment to the interstate network, so long as the interconnection will not harm the telephone company's facilities or employees, will not impair operation of the network, and will not interfere with the right of others to use the system. *Carterfone* was not appealed. AT&T instead filed tariffs with the FCC allowing subscribers to interconnect all types of equipment and communications systems to the public network. However, the new tariffs specified that direct electrical connection could be made only through a carrier-provided connecting arrangement. The Commission has found that requirement unduly restrictive. *Interstate and Foreign MTS and WATS*, 56 FCC 2d 593, under review as *North Carolina Utilities Commission* v. *Federal Communications Commission*, C.A. 4, No. 76-1002.

ing Corp., 45 FCC 2d 204, 217 (Pet. App. 24b). No conflict resulted because state and federal interconnection provisions were consistent.

C. The Telerent Order

Several terminal equipment manufacturers and distributors in 1973 called the FCC's attention to newly initiated actions by state regulatory commissions, which the complaining parties regarded as inconsistent with and potentially disruptive of the FCC's policies permitting telephone equipment interconnection to the interstate network.[7] In particular, they pointed to a rule proposed by the North Carolina Utilities Commission ("NCUC") which would generally prohibit the interconnection of customer-provided equipment to the systems of any telephone companies operating in North Carolina.[8] They also called attention to an opinion by the Nebraska attorney general advising the Nebraska Public Service Commission that any hotel or motel which furnished its own switchboard and other terminal equipment had to obtain a certificate of public convenience and necessity as if it were a communications common carrier, notwithstanding the interconnection policy set forth in *Carterfone*.[9] The complainants asked the Commis-

[7] *E.g., Carterfone*, 13 FCC 2d 420, reconsideration denied, 14 FCC 2d 571.

[8] The FCC later took official notice of a similar action by the Oklahoma Corporation Commission (Pet. App. 39b; 7a n. 1).

[9] The Nebraska Commission's subsequent action, taken on the basis of the state attorney general's opinion, was reversed by the Nebraska Supreme Court on grounds that the FCC's policy preempted inconsistent state actions. *Sherdon v. Dann*, 193 Neb. 768, 229 N.W. 2d 531.

sion to issue a declaratory order stating whether and, if so, to what extent its *Carterfone* pronouncement had preempted state action in this area. *Telerent Leasing Corp.*, 43 FCC 2d 487. The Commission invited comments from interested parties and held oral argument on the relationship of federal and state jurisdiction over terminal equipment interconnection. *Ibid.*

The Commission found that the actions by the state agencies in conflict with its own policies were "a source of great controversy and confusion for manufacturers and users" of customer-provided telephone equipment, and that they jeopardized the continuing viability of the federal policy of allowing the interconnection of equipment which does not endanger the technical integrity of the telephone system (Pet. App. 19b). The Commission concluded that a declaratory order as to the effect of such state actions was necessary to terminate the controversy and remove uncertainty.

On the merits, the Commission found:

1. that its authority to regulate interstate communications permits it to determine "the terms and conditions under which customers shall be reasonably permitted to use their own equipment" in connection with such communications (Pet. App. 25b);

2. that the FCC has consistently exercised jurisdiction over telephone equipment used in interstate communications notwithstanding the fact that the

same equipment serves intrastate purposes (Pet. App. 26b);

3. that the "commonality" and "indivisibility" of telephone equipment used for interstate and intrastate calls require that the rules governing interconnection be consistent for both jurisdictions (Pet. App. 26b); and

4. that Congress, in reserving state jurisdiction over intrastate communications, did not deprive the FCC of authority to regulate terminal equipment used commonly and indivisibly for interstate and intrastate communications (Pet. App. 23b-31b).

Accordingly, the Commission concluded (Pet. App. 31b):

> [T]his Commission has primacy in authority over the terms and conditions governing the interconnection of customer-provided equipment to the nationwide telephone network. No State regulation can oust this Commission from its clear jurisdiction over interstate communications and the regulation of the terms and conditions governing such communication, including the right of subscriber interconnections.

The Commission did not purport to occupy or preempt the entire area of terminal equipment regulation (Pet. App. 31b-33b):

> Although we have asserted Federal primacy in this area, it does not follow that the State commissions have no proper interest or that they are to be denied a participating role * * *. * * *
>
> * * * * *

> [O]ur actions do not foreclose any State from taking action of its own in the interconnect area so long as such action does not derogate the interstate ruling.

D. The Ruling Below

On petitions for review the court of appeals affirmed, with one member of the panel dissenting, in part.[10] The court rejected the notion that state regulation, "formally restrictive only of intrastate communication," could be allowed to frustrate valid federal policies governing interstate communication (Pet. App. 13a). It affirmed the FCC's determination that the actions of North Carolina, Nebraska and Oklahoma would have just such an effect. Thus, while it agreed with petitioners that the FCC has no regulatory power over intrastate services and facilities as such, it concluded that the FCC's assertion of primacy for its own interconnection policy was "reasonable administrative action within its statutory jurisdiction" (Pet. App. 9a-13a, 18a).

The court of appeals found support for its conclusions in (1) the express grant of authority to the FCC to regulate the facilities of interstate communications, 47 U.S.C. 151, 152(b), 153(a), (b), (e) and (f); (2) the fact that the FCC had exercised its jurisdiction over "terminal equipment used in con-

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[10] Because of potential conflicts of interest, all the active members of the Fourth Circuit except Judge Widener disqualified themselves. The majority of the panel consisted of Judge Hastie of the Third Circuit and Judge Tuttle of the Fifth Circuit.

nection with both interstate and intrastate communications" for almost 30 years without objection by Congress; (3) congressional recognition, elsewhere in the Act itself, of federal primacy in areas of common federal and state concern, 47 U.S.C. 410(c); (4) the fact that the Section 2(b) exemption of intrastate service from FCC regulation contains its own exception, subjecting "connecting" carriers to Commission authority under Sections 201 through 205 of the Act; and (5) legislative history establishing that the Section 221(b) exemption only bars the Commission from regulating service within a single telephone exchange that is technically interstate because the exchange spans a state border, as in Kansas City or Texarkana (Pet. App. 10a-18a).

ARGUMENT

The court of appeals' ruling, that the FCC's authority to regulate equipment used for interstate calls is not affected by the fact that the same equipment is also used for intrastate calls, conflicts with no decision of any other circuit or of this Court. Instead, it rests on a reading of the Communications Act that accords with the Act's purpose, structure, and legislative history, as well as with consistent FCC practice under the Act. A decision by this Court upsetting that consistent FCC practice, long approved by the courts and acquiesced in by Congress, would have far-reaching practical importance to the industry, the regulatory authorities, and the public which uses the telephone system. Any change of such

importance in the long-standing interpretation of the Act should come from Congress, not this Court. Indeed, petitioners support a bill introduced in the most recent session of Congress that would have the precise effect they urge this Court to reach by interpretation of the existing Act.[11] In light of the continuing legislative attention to this issue, there is no need for review by this Court.

A. The Purpose and Structure of the Communications Act

Congress established the Federal Communications Commission in 1934 and gave it a firm mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *." 47 U.S.C. 151. It authorized the Commission to regulate not only interstate services, but also the facilities used to provide such services. 47 U.S.C. 152(a), 153(a), (b), (e), (f). Further to insure that its regulation was effective, Congress expressly made Sections 201 through 205 applicable to local telephone companies providing interstate service only through connection to other telephone companies. 47 U.S.C. 152(b).

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[11] S. 3192, 94th Cong., 2d Sess. (1976); H.R. 12323, 94th Cong., 2d Sess. (1976). The bills would specifically deprive the FCC of authority to regulate terminal equipment. Hearings were held on September 28, 29 and 30, 1976, before the Communications Subcommittee of the House Interstate and Foreign Commerce Committee; the bills are expected to be reintroduced in the next session of Congress.

All the telephone companies that are parties to this case are "integrated into the national network and subject to the provisions of section 201 through 205" (Pet. App. 10a). The Commission's equipment interconnection policy and rulings are directly applicable to such companies because they arise from the requirement of Section 201 of the Act that charges and practices (including restrictions on interconnection) be "just and reasonable." See *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266, 268 (C.A. D.C.).

Nonetheless, AT&T and the other petitioners assert that Sections 2(b) and 221(b) of the Act, 47 U.S.C. 152(b) and 221(b), immunize telephone companies from federal regulation of the facilities used for interstate communication, so long as those same facilities are also used for intrastate communication. This interpretation is unsound. Facilities used to make and receive both interstate and intrastate calls are indisputably facilities used in interstate communication (Pet. App. 9a). Reading Section 2(b) to deprive the Commission of the authority to regulate these facilities would frustrate the Act's overall aim, "to make available, * * * to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Congress intended that the interstate and international communications network be subject to national control, and it gave the Commission the power to assert

that control. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157. The consequence of the petitioners' argument, however, would be that the terms of interconnection to the national and international telephone network would be controlled, not by the FCC, but by the fifty individual states. However, "fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication." *General Tel. Co. Calif.* v. *Federal Communications Commission*, 413 F. 2d 390, 401 (C.A. D.C.), certiorari denied, 396 U.S. 888. If the petitioners were correct, the national telephone network would be unprotected from incapacitation by States and localities exercising economic or technical regulation of facilities that are used for intrastate as well as interstate communication.[12] As the Nebraska Supreme Court stated last year in describing the consequences of petitioners' position, "[s]uch a result is, we believe, legally, logically, and practically unsupportable." *Sherdon* v. *Dann*, 193 Neb. 768, 774, 229 N.W. 2d 531, 535.[13]

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[12] For example, the Commission would be powerless to protect the network if a state regulatory commission should decide to improve local service by requiring or allowing the interconnection of equipment which because of electrical properties could damage the national network.

[13] It is not accurate to suggest, as does petitioner NCVC (Pet. No. 76-331, pp. 30-35), that interstate service is "merely incidental" to the primary responsibility of the industry, and thus that local, rather than federal, regulation should be preferred. Although the total number of interstate calls made

The petitioners' reading of the Act not only misconstrues Section 2(b), it also misconstrues Section 221(b). As the court below correctly noted, Section 221(b) "is intended to do no more than to prevent the circumstance that a single telephone exchange serves an area that includes parts of more than one state from enlarging the jurisdiction of FCC over the business and facilities of that exchange" (Pet. App. 17a). Thus the function of Section 221(b) is limited to withdrawing from Commission regulation service within a single exchange that is literally interstate because the exchange overlaps state boundaries.[14] But

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may be small in comparison to the number of intrastate calls (Pet. No. 76-331, pp. 25, 31; Pet. No. 76-332, pp. 2, 6), their importance to the industry and the national communications system is more accurately reflected by the fact that almost $9.5 billion, or 30 percent of total telephone industry revenues, came from interstate or foreign calls in 1975. Statistics of Communications Common Carriers, FCC, year ended December 31, 1975 (to be published late in 1976). In any event, such considerations could not affect the primacy of federal legislative authority under the Supremacy Clause of the Constitution.

[14] Congressman Rayburn, floor manager of the 1934 bill in the House, explained that Section 221(b) is "designed to cover cases of cities located within two States, as Texarkana." 78 Cong. Rec. 10314 (1934). The rest of the legislative history confirms this intent. See S. Rep. No. 781, 73d Cong., 2d Sess. 5 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934). Indeed, AT&T conceded, in oral argument before the Commission below, that Section 221(b) is not applicable to this situation (Pet. App. 25b, n. 21a; Tr. 102-103). The two cases on which it relies do not support its position here. *Southwestern Bell Tel. Co.* v. *United States*, 45 F. Supp. 403 (W.D. Mo.), involved an FCC attempt to regulate exchange service in the Kansas City exchange, which, like that in Texarkana, spans a state border. *Kitchen* v. *Federal Communications Commission*,

while Section 221(b) does not derogate from the Commission's authority in this case, it does undermine petitioners' construction of Section 2(b). If petitioners' reading of Section 2(b) were correct, there would be no need for the exemption in Section 221(b), for the telephones within a single exchange which covers two States are also facilities used for intrastate communication and thus would be immune from Commission regulation under Section 2(b) alone.[15]

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464 F. 2d 801 (C.A. D.C.), affirmed the Commission's ruling that it lacked jurisdiction to halt construction of a building designed to hold a telephone exchange facility because such a building is not a "line" within the meaning of Section 214, 47 U.S.C. 214. The court's subsequent statement that Section 221(b) also bars FCC jurisdiction is dictum. In any event, the objections in *Kitchen* to the construction of an exchange building in a residential area were more appropriately heard by a local zoning board than a federal regulatory agency; in contrast, the issues involved here relate directly to the Commission's responsibility for the effectiveness of the national telephone system, and thus are entirely appropriate for its consideration.

[15] There is no merit in AT&T's similar argument (Pet. No. 76-332, pp. 27-28) that petitioners' construction of Section 2(b) is necessary to give meaning to the exclusion of Section 301, 47 U.S.C. 301, from the reservation of state authority over purely intrastate operations. Section 301 requires a Commission license to engage in radio transmission, an activity that Congress meant the Commission to regulate even when that transmission was wholly intrastate. Thus Section 2(b) refers to Section 301 to make clear that all radio operation, even that used exclusively intrastate, is within the Commission's regulatory power. There is no similar reference to the other grants of Commission jurisdiction, since wire communication and equipment used exclusively intrastate are not within the Commission's regulatory authority.

B. The Legislative History of the Communications Act

Contrary to petitioners' contention that the decisions below are at odds with the Act's legislative history (Pet. No. 76-332, pp. 29-30; Pet. No. 76-331, pp. 35-40; Pet. No. 76-336, pp. 15-16), that history does not indicate a congressional intention to deprive the FCC of authority over terminal equipment used in interstate communications. The discussion of *Houston, E & W Texas Ry.* v. *United States*, 234 U.S. 342 ("the *Shreveport* case"), upon which petitioners rely, reflects concern on the part of some legislators and some witnesses at the hearings about federal intrusion into purely intrastate matters. They read the *Shreveport* case as authorizing the Interstate Commerce Commission to regulate purely intrastate rates by virtue of their indirect effect on interstate commerce, and sought to avoid giving similar power over purely intrastate matters to the communications commission then being established. The means chosen for avoiding that result was the explicit reservation in Section 2(b)(1) of purely intrastate matters to local regulatory bodies. But that rationale for Section 2(b)(1) does not justify giving it the expansive reading petitioners urge; it does not reserve matters involving both interstate and intrastate concerns exclusively to State regulation.

Instead, the legislative history indicates Congress intended to create an effective federal commission, one capable of implementing a unified national communications policy unhampered by potentially conflicting local policies. See, *e.g.*, 78 Cong. Rec. 8822

(1934) (remarks of Senator Dill). The local policies prohibiting use of independent terminal equipment present precisely such a conflict; if such equipment cannot be installed and used in connection with intrastate calls, it will not be installed on the same line for use in interstate calls, and the Commission policy permitting its use for interstate calls will be directly frustrated. Because of this direct and substantial effect of the local policy on interstate communications, the question of the applicability of the *Shreveport* doctrine—dealing with the indirect effects of local regulations on interstate commerce—is simply not involved in this case.

C. Consistent Commission Practice

Petitioners incorrectly suggest that the Commission has reversed itself in asserting jurisdiction over terminal equipment and has displaced long-standing state regulation (Pet. No. 76-331, pp. 16-19; Pet. No. 76-332, p. 35; Pet. No. 76-336, p. 20). On the contrary, as the court of appeals found (Pet. App. 15a-16a), "for some 30 years FCC has viewed and treated section 2(b)(1) * * * as imposing no bar to its exercise of jurisdiction over facilities used in connection with both intrastate and interstate telephone communications." The cases in which the Commission has exercised that jurisdiction are numerous. See *Southwestern Bell Telephone Co.*, 6 FCC 529, and cases cited at pp. 5-6, note 4, *supra*, and Pet. App. 26b-29b. AT&T in particular has included restric-

tions on the use of terminal equipment in its interstate tariffs since before the FCC was created in 1934; those provisions have been the subject of Commission scrutiny a number of times. *E.g.*, *Hush-A-Phone* v. *United States*, *supra*. The Commission nearly thirty years ago made plain its judgment that it has authority over equipment used in connection with both interstate and intrastate calls, when in 1947 it rejected an AT&T argument similar to that now advanced. *Use of Recording Devices*, 11 FCC 1033, 1047.[16]

Later, AT&T itself successfully asserted that the FCC had primary jurisdiction over a dispute involving the use of attachments to terminal equipment. The *Carterfone* case began as an antitrust suit by the makers of a device to be attached to a telephone to increase its usefulness. The case was referred by the district court to the Commission on AT&T's motion (*Carter* v. *AT&T*, *supra*). AT&T, not the Commission, has thus reversed itself in now asserting that the Commission has no jurisdiction over matters re-

[16] The Commission stated (*ibid.*):

> [T]he Bell System argument ignores the real consideration that interstate and foreign message toll telephone service requires the use of facilities that are not "exclusively interstate." This service necessarily involves all the facilities, charges, classifications, practices, services, and regulations used in the rendition of the service, and regulation of such service must be able to deal with all or any of the matters so involved if it is to be effective. This is clearly the purport of the comprehensive common carrier provisions of the Communications Act.

lating to terminal equipment used for both interstate and intrastate calls (Pet. App. 11a n. 5).[17]

Nor does the instant decision represent a novel attempt by the FCC to displace state regulation. It is true that federal and state regulation of equipment used for both interstate and intrastate calls has coexisted for many years. Because the state agencies and the telephone companies have heretofore acquiesced in the FCC regulation of terminal equipment interconnection by conforming the state policies with the federal policies, there has been no conflict necessitating a declaration of federal primacy. For example, when the Commission in *Carterfone* directed AT&T to file new tariffs modifying earlier restrictions on the use of attachments to terminal facilities for interstate calls, AT&T recognized that uniform practices were required, and filed conforming tariffs with the state commissions covering such use on intrastate calls. The state tariffs reflected the interstate ones; no conflict resulted.

The instant case has arisen because now, for the first time, certain states are considering or have adopted policies governing intrastate use of equipment that are inconsistent with the Commission policies for use of the same equipment in connection with interstate calls. The Commission and the court of appeals resolved the federal-state conflict thus created in favor of federal jurisdiction. This result is plainly correct, for, under the Supremacy Clause of

[17] Cf. *Phonetele, Inc.* v. *Public Utilities Comm'n*, 113 Cal. Rptr. 16, 20 n. 3, 520 P.2d 400, 404 n. 3 (Sup. Ct.).

the Constitution, a valid federal regulatory statute is supreme over inconsistent state law. *Hines* v. *Davidowitz*, 312 U.S. 52; *Farmers Union* v. *WDAY*, 360 U.S. 525. Petitioners offer no authority supporting proper resolution of such a conflict in any other fashion.

The remedy for dissatisfaction with Commission policy and its supremacy over contrary state policy lies not in this Court, but in Congress, where petitioners are urging the adoption of legislation that would overrule the decision below (see note 11, *supra*, p. 13). Whether petitioners will ultimately be successful in that effort or whether Congress will decide instead not to disturb the division of authority currently reflected in the Communications Act as consistently interpreted by the FCC, there is no need for review of the present case by this Court.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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October Term, 1976

No. 76-331

THE NORTH CAROLINA UTILITIES COMMISSION, SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, et al.,

Petitioners,

vs.

THE FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, et al.,

Respondents,

On Petition for A Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE STATE OF NEBRASKA ex rel. NEBRASKA PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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BRIEF OF AMICUS CURIAE STATE OF NEBRASKA ex rel. NEBRASKA PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

THE STATE OF NEBRASKA'S INTEREST

Nebraska has a population of approximately one and one-half million people. Virtually all of these people receive telephone service from one of the forty-eight regulated telecommunications common carriers operating in Nebraska.

The Nebraska Public Service Commission is the constitutionally created body charged with the intrastate regulation of rates, services and the general control of the telephone companies in Nebraska. The purpose of this Commission is to protect and serve the people so that their telephone service is the most advanced and most economical while at the same time providing an adequate rate of return to the telephone companies.

The interest of the State of Nebraska in this proceeding, therefore, is to protect and maintain the rightful function of its Public Service Commission against the declared purpose of the Federal Communications Commission to usurp the state's jurisdiction over telephone terminal equipment and facilities.

ARGUMENT

In the early part of 1974 the Federal Communications Commission declared that it had preempted the state regulation of interconnection of customer provided terminal equipment to local telephone exchanges and intrastate switched telephone networks. In deciding whether to grant a writ of certiorari it is important that this Court recognize the far reaching implications and effect of that action.

The effect of the F.C.C.'s action on the people of Nebraska is both immediate and substantial. The Nebraska Public Service Commission will no longer be able to regulate the provision of and rates for terminal equipment according to local demand and need. More importantly, however, the F.C.C. will be able to (and apparently intends to) open the terminal equipment field to competition. If it is true that terminal equipment subsidizes the residential

telephone, then the potential loss of revenue from terminal equipment will result in an increase in the monthly residential telephone rate. In addition, the possibility exists that the cost of long lines that are supplied by American Telephone and Telegraph will increase to the small independent telephone company. The obvious end result is that the people of Nebraska will experience an increase in rates for their monthly telephone service.

It is apparent that any decision of this Court will have a direct and immediate effect on virtually all telephone subscribers in the State of Nebraska and therefore it is important that the issues presented by this case be reviewed by the United States Supreme Court.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgement and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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No. 76-331

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Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents,

AND

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONS FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONS FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Now comes the Public Utilities Commission of Ohio (PUCO) by its counsel William J. Brown, Attorney General of Ohio, in support of the Petitions of the North Carolina Utilities Commission, the Southeastern

Association of Regulatory Commissioners, and the National Association of Regulatory Utility Commissioners (NARUC), et al., for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the cases of: *North Carolina Utilities Commission v. Federal Power Commission*,-F. 2d- (4th Cir. 1976), and *National Association of Regulatory Commissioners v. Federal Power Commission*,-F. 2d (4th Cir. 1976), which have not yet been formally reported. This *Amicus Curiae* Brief of the Public Utilities Commission of Ohio in support of the Petitions is filed pursuant to U.S. Sup. Ct. Rule 21 (4), 28 U.S.C. This filing has been made as promptly as possible as required by said rule.

INTEREST OF THE AMICUS CURIAE

The PUCO is the Commission created by the Legislature of the State of Ohio and charged with the responsibility, *inter alia*, for supervising and regulating telephone companies operating in the State of Ohio. *Ohio Revised Code* Sections 4905.02, 4905.04, and 4905.06 (1954). In accordance with that responsibility, the PUCO must assure that every telephone company operating in Ohio furnishes necessary and adequate service and that all charges made for such service are just and reasonable. *Ohio Revised Code* Section 4905.22 (1954). State commissions like the PUCO, in pursuance of their supervisory authority over rate making must have jurisdiction over facilities and entry into the market for terminal equipment in order to effectuate state policies with respect to charges.

Traditionally, the provision of terminal telephone equipment has been considered to be an integral part of the telecommunications service provided by tele-

phone companies. As such, it is an integral part and has a significant impact on other aspects of the total telephone service in Ohio subject to the regulation of the PUCO. Because the decision below would impair, if not destroy, the power of state commissions to pursue their rate making policies so far as terminal equipment is concerned, the PUCO strongly supports the Petitioners.

STATEMENT OF THE CASE

Petitioners seek review of the decision of the Court of Appeals which affirmed an order of the Federal Communications Commission (FCC) ruling that it had authority under the Communications Act of 1934 to preempt state regulation of terminal equipment interconnected with local telephone exchange equipment.

The clear division of authority between the state commissions and the FCC established by the Communications Act, 47 U.S.C. Sections 151, 152(a), has been dealt a serious blow by the decision below, despite the plain language of Sections 2(b) and 221(b) of the Act which indicates Congress' clear intent to preserve authority over intrastate communications to the states.

Earlier FCC decisions expressly recognized state jurisdiction over the connection of terminal equipment with intrastate communications. *Use of Recording Devices*, 11 FCC 1033 (1947); *Jordaphone*, 18 FCC 644 (1954); *Hush-a-Phone*, 22 FCC 2d 420 (1957). Then in *Carterfone*, 13 FCC 2d 420 (1968), *reconsideration denied*, 14 FCC 2d 571 (1968), the FCC held invalid provisions of interstate tariffs which prohibited the use of the Carterfone, a device used to interconnect radio communication systems to the telephone network. It is significant, though, that the FCC limited its ruling to interstate and foreign telephone service, and not intrastate service.

Subsequent to *Carterfone*, many state regulators became concerned that the continually increasing substitution of customer-provided equipment might adversely affect residential telephone users with regard to the quality and cost of their telephone service. Following preliminary investigations by NARUC, the North Carolina Utilities Commission, and the issuance of an advisory opinion by the Attorney General of Nebraska, the North American Telephone Association (NATA) filed a petition on August 8, 1975, requesting the FCC to invoke the declaratory order provisions of the Administrative Procedure Act, 5 U.S.C. Section 554 (e).

The validity of the February 5, 1974 Order issued by the FCC pursuant to NATA'S requests (see NARUC's appendix at page 36a) is at issue. In that Order the FCC declared that it had preempted state regulation of the connection of customer-provided terminal equipment to local telephone exchanges and intra-state switched telephone networks. The NARUC, the North Carolina Utilities Commission, the Southeastern Association of Regulatory Commissioners and several other parties sought review of the FCC Order by the Fourth Circuit Court of Appeals. On April 14, 1976, that Court handed down a 2-1 decision affirming the FCC Order. (see NARUC appendix, at la). Several petitioners before the Court of Appeals filed a petition for rehearing with the Court, which was denied on June 8, 1976. In the opinion of the PUCO, the issue of the validity of the FCC Order, Docket No. 19808, presents a fundamentally important question with respect to the proper spheres of jurisdiction of the FCC and the state commissions, and for that reason presents an eminently proper case for the grant of certiorari by this Court.

REASONS FOR GRANTING THE WRIT

The FCC order preempting state jurisdiction over the interconnection of terminal equipment represents the first attempt to distinguish the power of the states to regulate intrastate rates and services from the power to regulate the terms and conditions under which terminal equipment can be interconnected. Such a distinction is unwarranted in that the regulation of rates, services and equipment are inextricably intertwined. Because the increased use of customer-provided terminal equipment may divert revenues from the telephone companies and lead to increased charges for local residential users, the state's retention of jurisdiction over terminal equipment is crucial to its regulation of local rates. The Court of Appeals' sustaining of the FCC order is contrary to Congress' recognition that regulatory authority over charges and equipment should not be fragmented between different levels of government.

The Court of Appeals' decision is contrary to the legislative intent of the Communications Act. Section 2(b) of the Act, providing that the FCC may not use its jurisdiction over interstate communications to intrude upon the states' jurisdiction over intrastate communications, charges, services or facilities, reflects Congress' intent to preserve the then existing state jurisdiction over intrastate telephone traffic. In the opinion of the *amicus curiae*, this Court ought to review the Court of Appeals' sustaining of an FCC order which relied on a construction of the Communications Act that is contrary to the language and intent of the Act.

Further, this Court should grant certiorari to consider the basic principles of Federalism at issue. No

matter how the issue is resolved on the merits, this case presents a significant Federal question. If the decision of the Court of Appeals stands, the FCC will have preempted state authority in an area primarily of local concern and effect which should be left to regulation by the states. The economic effect of the increased use of customer-provided equipment will vary within individual localities and requires local overseeing. The ability of the states to protect the public against adverse effects will be weakened by the FCC's preemption of state authority to regulate the interconnection of terminal equipment. This raises crucial issues of Federalism which are eminently deserving of review by the Supreme Court of the United States.

CONCLUSION

Amicus curiae PUCO supports the petitions for a writ of certiorari of the judgment of the Fourth Circuit Court of Appeals in the consolidated case below and respectfully urges this Court to grant such Petitions.

Respectfully submitted,

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APPENDIX

Statutory provisions referred to herein which are not set forth in the Appendices of the Petitioners.

Section 4905.02, Ohio Revised Code (1954)
4905.02 (614-2a). "Public utility" defined.

As used in sections 4905.01 to 4905.64, inclusive, of the Revised Code, "public utility" includes every corporation, company, co-partnership, person, or association, their lessees, trustees, or receivers, defined in section 4905.03 of the Revised Code, including all telephone companies, but excepting such other public utilities as operate their utilities not for profit, such other public utilities as are owned or operated by any municipal corporation, and railroads as defined in sections 4907.02 and 4907.03 of the Revised Code.

Section 4905.03, Ohio Revised Code (1954)
4905.03 Definitions.

As used in sections 4905.01 to 4905.64, inclusive, of the Revised Code:

(A) Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

(1) A telegraph company, when engaged in the business of transmitting telegraphic messages to, from, through, or in this state;

(2) A telephone company, when engaged in the business of transmitting telephonic messages to, from, through, or in this state and as such is a common carrier;

(3) A motor transportation company, when engaged in the business of carrying and transporting persons or property or the business of providing or furnishing

such transportation service, for hire, in or by motor-propelled vehicles of any kind, including trailers, for the public in general, over any public street, road, or highway in this state, except as provided in section 4921.02 of the Revised Code;

(4) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state;

(5) A gas company, when engaged in the business of supplying artificial gas for lighting, power, or heating purposes to consumers within this state or when engaged in the business of supplying artificial gas to gas companies or to natural gas companies within this state, but a producer engaged in supplying to one or more gas or natural gas companies, only such artificial gas as is manufactured by such producer as a by-product of some other process in which such producer is primarily engaged within this state is not thereby a gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between any gas company and any other gas company or any natural gas company providing for the supplying of artificial gas and for compensation for the same, are subject to the jurisdiction of the public utilities commission, whether or not such rates, rentals, tolls, schedules, charges, or agreements were agreed upon or put into effect prior to July 10, 1933;

(6) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state, or when engaged in the business of supplying natural gas to gas companies or to natural gas companies within this state, but where a producer supplies to one or more gas or natural gas companies only such gas as

is produced by such producer from wells drilled on land owned in fee by such producer or where the principal use of such land by said producer is other than the production of gas, within this state, such producer is not thereby a natural gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas companies providing for the supply of natural gas and for compensation for the same, are subject to the jurisdiction of the public utilities commission, whether or not such rates, rentals, tolls, schedules, charges, or agreements were agreed upon or put into effect prior to July 10, 1933. The commission may, upon application made to it, relieve any producer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code, so long as such producer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as such producer does not engage in the distribution of natural gas to consumers;

(7) A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state;

(8) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

(9) A heating or cooling company, when engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating or cooling purposes;

(10) A messenger company, when engaged in the business of supplying messengers for any purpose;

(11) A street railway company, when engaged in the business of operating as a common carrier, a railway, wholly or partly within this state, with one or more tracks upon, along, above, or below any public road, street, alleyway, or ground, within any municipal corporation, operated by any motive power other than steam and not a part of an interurban railroad, whether such railway is termed street, inclined-plane, elevated, or underground railway;

(12) A suburban railroad company, when engaged in the business of operating as a common carrier, whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad;

(13) An interurban railroad company, when engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights of way, outside of municipal corporations, using electricity or other motive power than steam power for the transportation of passengers, packages, express matter, United States mail, baggage, and freight. Such interurban railroad company is included in the term "railroad" as used in section 4907.02 of the Revised Code;

(14) A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state.

(B) "Motor-propelled vehicle" means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

Section 4905.04, Ohio Revised Code (1954)

4905.04 Power to regulate public utilities and railroads.

The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law, and to promulgate and enforce all orders relating to the protection, welfare, and safety of railroad employees and the traveling public, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

Section 4905.06, Ohio Revised Code (1954)

4905.06 (614-8). General supervision.

The public utilities commission shall have general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and shall have power to examine such public utilities and keep informed as to their general condition, capitalization, and franchises and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises, and charter requirements. The commission,

through the public utilities commissioners or inspectors or employees of the commission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility.

Section 4905.22, Ohio Revised Code (1954)

4905.22 (614-12) (614-13). Service and facilities required; unreasonable charge prohibited.

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

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THE NORTH CAROLINA UTILITIES COMMISSION, SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, et al.,

Petitioners,

vs.

THE FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for A Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE STATE OF NEW MEXICO, ex. rel. NEW MEXICO STATE CORPORATION COMMISSION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1976

No._____

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BRIEF OF AMICUS CURIAE STATE OF NEW MEXICO, ex rel. NEW MEXICO STATE CORPORATION COMMISSION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The State of New Mexico has a population of approximately 1,169,400 people. Seventeen telephone companies operate in the state and provide a wide range of services, including terminal equipment which has historically been regulated by the New Mexico State Corporation Commission.

The Commission is the constitutional body which has the power and the duty of fixing, determining, supervising, regulating and controlling all charges and rates of telephone companies within the state.

The interest of the State of New Mexico in this proceeding is to maintain the jurisdiction over terminal equipment and facilities which it has historically exercised and to protect that jurisdiction from encroachment by improper actions of the Federal Communications Commission.

ARGUMENT

The Federal Communications Commission exceeded its authority under Section 2(b) and 221(b) of the Communications Act of 1934 when it preempted the jurisdiction of the New Mexico State Corporation Commission over terminal equipment which is used predominately in local and intra-state telephone service.

Such action by the FCC will result in an unnecessary deprivation of the power of the people of the State of New Mexico, through their elected Commissioners, to regulate telephone equipment at the local level. The State Corporation Commission remains in a far better position than the FCC to gauge the needs of telephone subscribers in the state. It remains in a far better position to choose rate structures for terminal equipment and facilities to be used within the state.

The New Mexico Commission believes the decision of the United States Court of Appeals for the Fourth Circuit is contrary to the language and intent of the Communications Act of 1934. The decision also violates clear principles of federalism.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgement and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Petitioners,

vs.

THE FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, et al.,

Respondents,

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE IOWA STATE COMMERCE COMMISSION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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October Term, 1976

No. 76-331

THE NORTH CAROLINA UTILITIES COMMISSION, SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, et al.,

Petitioners,

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THE FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, et al.,

Respondents,

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Fourth Circuit

BRIEF OF AMICUS CURIAE IOWA STATE COMMERCE COMMISSION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

THE STATE OF IOWA'S INTEREST

The Iowa State Commerce Commission (Commission) is the agency of the State of Iowa charged with the responsibility

of regulating the rates and services of telephone utility companies within the State of Iowa.

ARGUMENT

On April 26, 1976, the Commission declared in a "Statement of Policy" regarding Federal Communications Commission (FCC), Docket No. 19528, "PART 68 -- CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK: Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)," that despite the subject decision of the United States Fourth Circuit Court of Appeals, the Commission was of the view that "... the FCC's enabling legislation protected the authority of the states over intrastate telephone service, including the connection of terminal equipment, from incursion by the FCC." The Commission has accordingly rejected one proposed telephone tariff allegedly filed in compliance with the above cited FCC order for noncompliance with Iowa statutory law and presently has seven separate investigatory proceedings pending as to proposed tariffs which permit the interconnection of telephone terminal equipment once such is registered with the FCC. Resolution of these proceedings will necessarily entail a determination of the technological and economic aspects of the interconnection of customer-provided terminal equipment with the telephone network.

While the Commission has taken this action in light of the statutory duty imposed upon it, it is mindful of the conflicting authority of the scope of FCC jurisdiction which the decision of the U.S. Circuit Court of Appeals presents and therefore believes that there is a compelling need for the United States Supreme Court to resolve the conflicting views as to the scope of the FCC's jurisdiction over telephone rates and service.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

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